(25,494)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

No. 664.

ABE DANCIGER ET AL., DOING BUSINESS AS DANCIGER BROTHERS, PLAINTIFFS IN ERROR,

vs.

D. G. COOLEY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

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a

No. 19945.

ABE DANCIGER et al., Appellants,
vs.
D. G. COOLEY, Appellee.

Be it remembered, that on the 29th day of January, 1915, there was filed in the office of the Clerk of the Supreme Court of the State of Kansas, a certified copy of the Notice of appeal and the proof of service thereof, and of the Journal Entry of judgment complained of, in the above entitled case, which notice of appeal and journal entry of judgment are in the words and figures, as follows, to-wit:

b

No. 19945.

In the District Court of Shawnee County, Kansas, First Division.

No. 26202.

ABE DANCIGER, DAN DANCIGER, JOE DANCIGER, M. O. DANCIGER, *M. O. Danciger*, and Jack Danciger, Doing Business as a Copartnership under the Firm-name and Style of Danciger Brothers, Plaintiffs,

vs.

D. G. COOLEY, Defendant.

Notice of Appeal.

To the above-named defendant, D. G. Cooley, and Otis Hungate, his attorney of record:

You and each of you are hereby notified that the plaintiff above named appeals from the judgment and order of the Court in the above entitled case entered herein on the 7th day of December 1914, sustaining the demurrer of the defendant, to the evidence of the plaintiff as to the first and fourth causes of action as set out in plaintiff's second amended petition, and to the judgment and order of the court entered on the 7th day of December, 1914, as to the second and third causes of action as set out in plaintiff's second amended petition and in rendering judgment against the plaintiff and in favor of the defendant for costs.

R. E. JACOBS AND
C. P. COWGILL,
Attorneys for Plaintiff.

Service of the foregoing notice is hereby acknowledged this 13th day of January, 1915.

OTIS E. HUNGATE.

Endorsements: No. 26202. Danciger Bros., Plaintiff, vs. D. G. Cooley, Defendant. Notice of Appeal. Filed Jan. 13, 1915. C. W. Bower, Clerk District Court.

c Whereas, Be It Remembered, That on the 7th day of December, A. D. 1914, in the Shawnee County District Court, Third Judicial District State of Kansas, before the Honorable A. W. Dana, presiding Judge of the First Division, it being at the September, 1914, term of said Court, the following proceedings among others were had to-wit:

First Division.

No. 26202.

ABE DANCIGER, DAN DANCIGER, JOE DANCIGER, M. O. DANCIGER, Jack Danciger, Doing Business as a Copartnership under the Firm-name and Style of Danciger Brothers, Plaintiffs,

vs.

D. G. COOLEY, Defendant.

Be it remembered, That on this 7th day of December, 1914, it being one of the regular days of the September, A. D. 1914, term of said court, this case came on for hearing in the First Division of said Court, Honorable A. W. Dana, Judge, presiding, upon the second amended petition of the plaintiffs and answer of defendant and reply of plaintiffs. Plaintiffs appeared by their attorneys, Clyde Cowgill and —— Jacobson, the defendant appeared in person and by his attorneys, Hungate & Heinz.

Thereupon the parties announced themselves ready for trial; thereupon came H. J. Snooks, W. L. Kirkwood, C. E. Brown, W. C. Burt, W. B. Harsha, Thomas Rowles, Wm. Henderson, H. C. Fraser, C. E. Olander, M. B. Trimble, R. J. Foster and S. G. Core, twelve true and lawful men of the body of the County of Shawnee, who were duly impaneled and sworn to try said cause; thereupon plaintiffs introduced their evidence and rested; thereupon the defendant filed his demurrer to the evidence of plaintiffs upon the first and fourth causes of action set out in said second amended petition, upon the ground that the evidence upon said first and fourth causes of action fails to sustain a cause of action in favor of plaintiffs and against the defendant.

d After listening to the arguments of counsel and being fully advised in the premises, the Court finds that the evidence upon the first and fourth counts of said amended petition does not prove a cause of action in favor of plaintiffs and against the defendant.

It is therefore by the court considered, ordered and adjudged that said demurrer to the evidence upon the first and fourth counts be and the same is hereby sustained and the case so far as said first and fourth counts is concerned is taken by the court from the further consideration of the jury and that the defendant have and re-

cover judgment of and from the plaintiffs for his costs herein expended upon the said first and fourth counts of said petition to which judgment of the Court the plaintiffs duly excepted.

Thereupon the defendant introduced his evidence in defense to the second and third counts in said second amended petition and rested; thereupon the Court instructed the jury upon the law as to the second and third counts of said petition. After listening to the arguments of counsel the jury retired to their jury room in charge of their sworn bailiff to consider of their verdict. Thereafter the jury returned into court with their verdict, which is in words and figures as follows, to-wit:

THE STATE OF KANSAS,
Shawnee County ss:

In the District Court, Third Judicial District, First Division.

No. 26202.

ABE DANCIGER et al., Plaintiff,
vs.
D. G. COOLEY, Defendant.

Verdict.

We, the jury impaneled and sworn in the above entitled case, do, upon our oaths, find for the defendant.

R. J. FOSTER, *Foreman.*

e Thereupon the jury was discharged from the further consideration of said cause.

It is therefore by the court considered, ordered and adjudged upon the verdict of the jury herein that the defendant have and recover from the plaintiffs his costs expended herein upon said second and third causes of action as set out in the second amended petition and that the plaintiffs take nothing by reason of this action. To this judgment of the Court the plaintiff at the time duly excepted.

A. W. DANA, *Judge.*

f Whereas, Be it Remembered, That on the 2nd day of January, A. D. 1915, in the Shawnee County District Court, Third Judicial District, State of Kansas, before the Honorable A. W. Dana, presiding Judge of the First Division, it being at the September, 1914, term of said Court, the following proceedings among others, were had to-wit:

First Division.

No. 26202.

ABE DANCIGER, DAN DANCIGER, JOE DANCIGER, M. O. DANCIGER, Jack Danciger, Doing Business as a Copartnership, under the Firm-name and Style of Danciger Brothers, Plaintiffs,

vs.

D. G. COOLEY, Defendant.

Be it Remembered That on this 2nd day of January, 1915, it being one of the days of the regular September, A. D. 1914, term of said court, this cause came on for hearing upon the motion of the plaintiffs to vacate the verdict heretofore rendered by the jury herein and for the granting of a new trial. After listening to arguments of counsel and being fully advised in the premises, the Court finds that the verdict returned by said jury is in conformity to law, is supported by the evidence and the same is hereby approved by the court.

It is therefore by the court considered, ordered and adjudged that said motion of plaintiff to vacate the verdict and to grant a new trial herein be and the same is hereby overruled, to which ruling of the Court the plaintiff at the time duly excepted.

A. W. DANA, *Judge.*

g *Certificate.*

STATE OF KANSAS,
Shawnee County, ss:

C. W. Bower, Clerk of the District Court within and for the County and State aforesaid, do hereby certify that the above and foregoing is a full, true and correct copy of Notice of Appeal, Acknowledgement of Service of Notice of Appeal, Journal Entry of Judgment and Order overruling Motion for a New Trial, in the above entitled cause, as the same remains on file and of record in my office.

Witness my hand and the seal of said court, hereunto affixed at my office in the city of Topeka, this 27th day of January A. D. 1915.

[SEAL.] C. W. BOWER, *Clerk,*
By FLORENCE F. SCOTT,
Deputy Clerk.

(Endorsed:) 19945. Abe Danciger et al., Appellants, vs. D. G. Cooley, Appellee. Notice-of-Appeal and Transcript. Filed Jan. 29, 1915. D. A. Valentine, Clerk Supreme Court.

h And Afterwards, on the 3rd day of November 1915, there was filed in the office of the Clerk of the Supreme Court of the State of Kansas, an abstract of the record of the appellant, and on April 3rd, 1916 the counter abstract of the appellee which constituted the record upon which this appeal was considered, which

abstract and counter abstract, are in the words and figures as follows to-wit:

i Filed Nov. 3, 1915. D. A. Valentine, Clerk Supreme Court.

19945.

In the Supreme Court of the State of Kansas.

No. 19945.

ABE DANCINGER, DAN DANCINGER, JOE DANCINGER, M. O. Danciger and Jack Danciger, Doing Business as a Copartnership under the Firm-Name and Style of Dancinger Brothers, Appellants,

vs.

D. G. COOLEY, Appellee.

Abstract of Appellant.

R. E. Jacobs, Kansas City, Missouri;
C. P. Cowgill, Topeka, Kansas; Attorneys for the Plaintiffs.

1 In the Supreme Court of the State of Kansas.

No. 19945.

ABE DANCINGER, DAN DANCINGER, JOE DANCINGER, M. O. Danciger and Jack Danciger, Doing Business as a Copartnership under the Firm-Name and Style of Dancinger Brothers, Appellants,

vs.

D. G. COOLEY, Appellee.

Abstract of Appellant.

This action was begun in the district court of Shawnee County on August 10, 1910, being Case No. 26202 in that court, by Abe Dancinger, Dan Dancinger, Joe Dancinger, M. O. Dancinger and Jack Dancinger, doing business as a copartnership under the firm name and style of Dancinger Brothers, plaintiffs, vs. D. G. Cooley, defendant.

2 The second amended petition of the plaintiffs, omitting the caption is as follows:

"Now come the plaintiffs and for their cause of action against the defendant complain and allege:

First Cause of Action.

That the said plaintiffs above named during all the times hereinafter mentioned were and now are doing business at Kansas City,

Missouri, as a co-partnership, under the firm name and style of Danciger Brothers.

Plaintiffs further say that sometime during the latter part of the year 1909, and prior to the first day of December, 1909, these plaintiffs and the defendant entered into an oral contract whereby the said defendant became the agent of the plaintiffs for the collection of moneys owing to said plaintiffs for goods, wares and merchandise by them sold and delivered as hereinafter more fully alleged, and that thereafter and during the year 1910, and prior to the commencement of this suit, the said defendant, as such agent, collected and received for these plaintiffs from various persons to whom sales and deliveries had been made, of goods, wares and merchandise, as hereinafter alleged, the aggregate sum of two hundred and eighty-three and 50-100 dollars. That under said contract of agency the said defendant was entitled to receive and retain for himself
3 as compensation for making said collections the sum of seventy-five and 50-100 dollars, leaving a balance of two hundred and eight dollars in his hands, which the defendant should have paid over to these plaintiffs at or about the time said collections were made. That said money was all collected prior to the commencement of this suit, and that said balance of $208.00 was due and payable to the plaintiffs from said defendant as their agent sometime prior to the commencement of this action, but that said defendant has failed, neglected, and refused to pay over to said plaintiffs the said sum of $208.00 or any part thereof, although often requested so to do.

That said goods, wares and merchandise sold and delivered as hereinbefore alleged consisted of whiskey; that the sale and delivery thereof were made at the City of Kansas City, and in the State of Missouri, and that under the laws of the State of Missouri, then and now in force, the sale and delivery of said whiskey by said plaintiffs as hereinbefore alleged were legal and were lawfully made under the laws of the State of Missouri.

An itemized statement of the account, showing the dates of sales, the persons from whom collected by defendant, the amount collected from each of the said parties to whom sales were made, with the amount of commission to which defendant was entitled upon each sale, and the aggregate amount of collections and commissions, is attached to the amended petition herein filed, marked exhibit
4 "A", and is hereby referred to and made a part of this second amended petition and of this cause of action.

Second Cause of Action.

For their second cause of action against the defendant, the plaintiffs refer to their cause of action herein and to avoid repetition, make the same a part of this, their second cause of action, and further allege that in December, 1909, and in January, 1910, these plaintiffs, at the special instance and request of the defendant, and upon his order, sold and delivered to said defendant certain goods, wares and merchandise, as is more fully hereinafter alleged, amount-

ing in the aggregate to the sum of $79.00. That the price charged for said goods, wares and merchandise is the reasonable market value thereof, which amount defendant agreed to pay plaintiff therefor.

That said defendant was and is entitled to a credit of $6.00 on said account as a discount, leaving a balance of $73.00 due and unpaid on said account long prior to the commencement of this suit, and which said balance of $73.00 or any part thereof, the defendant has failed, neglected and refused to pay and that by reason thereof there is now, and was at the commencement of this suit, due and unpaid to said plaintiffs from said defendant the sum of $73.00.

That the said goods, wares and merchandise sold and delivered to said defendant, as hereinbefore alleged, consisted of whiskey;
5 that the sale and delivery thereof was made in the City of Kansas City, in the State of Missouri, and that under the laws of the State of Missouri as then and now existing, the sale and delivery of said whiskey was legal and the sale and delivery of said whiskey by said plaintiffs to the defendant, as herein before alleged, was lawfully and legally made under the laws of the State of Missouri.

An itemized statement of the account of said sales, the articles of merchandise, the price and value of each item, and the amount thereof, and the discount thereon, are contained in exhibit "B," attached to the amended petition herein filed, marked exhibit "B," and said exhibit "B" shows the full account, duly verified, between these plaintiffs and the defendant growing out of the first, second, third and fourth causes of action herein, and said exhibit "B" is hereby refer-ed to and made a part of this second amended petition and of this cause of action.

Third Cause of Action.

For their third cause of action against the defendant, plaintiff refers to their first cause of action herein and to avoid repetition, makes the same a part of this, their third cause of action, and further alleges:

That during the month of January, 1910, The Royal Brewing Company, a corporation duly incorporated and doing business under the laws of the State of Missouri at all times hereinafter
6 mentioned, at the special instance and request of defendant, and upon his order, sold and delivered to said defendant certain goods, wares and merchandise as hereinafter more fully alleged, and the aggregate amount or sale price and value of said goods, wares and merchandise so sold and delivered to said defendant was the sum of $20.65; that the charges made for said goods, wares and merchandise was the fair and reasonable market price therefor, which sum defendant agreed to pay therefor.

That thereafter and before the commencement of this suit, the said Royal Brewing Company, for value received, and in writing, duly assigned, transferred and delivered to these plaintiffs the said account owing to the said The Royal Brewing Company from said

defendant, as aforesaid, and that these plaintiffs have ever since been and now are the owners and holders of said account and are entitled to have and receive the amount due and unpaid thereon. That said defendant neglected, failed and refused to pay the said account or any part thereof, and that by reason thereof there was due and unpaid to said plaintiffs at the commencement of this suit and there is now due and unpaid and owing to said plaintiffs from said defendant, the said sum of $20.65.

That the said goods, wares and merchandise sold and delivered to said defendant as hereinbefore alleged consisted of beer; that the sale and delivery thereof were made in the City of Kansas City, in the State of Missouri and that under the laws of the State
7 of Missouri, as then and now existing, the sale and delivery of said beer by said plaintiff to the defendant as hereinbefore alleged was lawful and was legally made under the laws of the State of Misssouri.

An itemized statement of the account for said beer sold and delivered as aforesaid, is as follows, to-wit:

Jan. 3, 1910, D. G. Cooley empties, $2.00, Beer $5.25.....	$7.25
Jan. 24, 1910, D. G. Cooley empties, $2.00, Beer $7.40.....	$9.40
Jan. 28, 1910, D. G. Cooley empties, $1.50, Beer $2.50.....	$4.00
Total.....	$20.65

The items of said account are included in Exhibit "C," attached to the amended petition herein filed, and a written assignment of said account is attached to and is a part of said Exhibit "C," and said exhibit "C" is herein referred to and made a part of this second amended petition and this cause of action for the purpose of showing said assignment.

Fourth Cause of Action.

For their fourth cause of action against the defendant plaintiffs refer to their first and third cause of action herein, to avoid repetition, make the same a part of this, their fourth cause of action, and further allege:

That some time during the latter part of the year 1909, said The Royal Brewing Company and the defendant entered into an
8 oral contract whereby the said defendant became the agent of said The Royal Brewing Company for collection of moneys owing to said company for goods, wares and merchandise by said company sold and delivered as hereinafter more fully set forth. That the aggregate amount and value of said goods so sold and delivered, and for which the said defendant became the agent of said Company for the collection, was the sum of $252.10; that of the goods so sold and delievered, goods to the amount and value of $48.80 were thereafter returned by the parties to whom said sales were made and were received and accepted by said company, leaving a balance of $203.30 to be collected by said defendant. That during

the latter part of the year 1909, and the year 1910, and prior to the commencement of this suit, the said defendant, as such agent of the Royal Brewing Company, collected and received from said company from the various persons to whom said sales were made, the said sum of $203.30. That under said contract of agency the said defendant was entitled to receive and retain for himself as compensation for making said collections the sum of $60.30; that thereafter and of the amount collected, as aforesaid, the said defendant paid over the sum of $100.00 in cash, thereby leaving a balance of $43.00 in the hands of said defendant collected and not paid over.

That said The Royal Brewing Company, for value received, and in writing, and prior to the commencement of this suit, duly
9 assigned, transfer-ed and delivered said account for money collected and the balance unpaid thereon to these plaintiffs, and these plaintiffs have ever since said assignment been, and now are, the owners and holders of said account and the balance unpaid thereon; that the said defendant has failed, neglected and refused to pay over to these plaintiffs said balance collected by him as aforesaid and that by reason thereof there is now due and unpaid to said plaintiffs from said defendant the sum of $43.00.

That the said goods, wares and merchandise sold and delivered as aforesaid consisted of beer; that the sale and delivery thereof was made in the City of Kansas City, in the State of Missouri, and that under the laws of the State of Missouri, as then and now in force, the sale and delivery of said beer was legal, and the sale and delivery of said beer as aforesaid were legally and lawfully made under the laws of the State of Missouri.

An itemized statement of said account, showing the dates of sales, the parties to whom sales were made, and from whom collections were made, and the amounts thereof, with amount of credits as hereinbefore alleged, is attached to the amended petition herein filed marked exhibit "C," and is hereby referred to and made a part of this second amended petition and this cause of action, omit-ing therefrom the items therein contained set up separately and included in the third cause of action of this second amended petition.

10 A written assignment of said account is also attached to said exhibit "C", and is hereby referred to and made a part of this second amended petition.

Wherefore, plaintiff demands judgment against said defendant for the sum of $344.65, the aggregate amount due and unpaid to said plaintiffs as set forth in their first, second, third, and fourth causes of action herein, and for costs of suit.

J. B. LARIMER AND
CHAS. F. SPENCER,
Attorneys for Plaintiffs.

The following is a copy of exhibits "A", "B", and "C", as set forth in the amended petition and referred to in the second amended petition:

EXHIBIT "A".

D. G. Cooley, Topeka, Kansas.

Collections for Dancinger Bros.

Date.	Shpt No.	Consignee.		Invoice.		Amt. of inv.	Col. fee.	Amt. due.
1-29-10	39391	Louis Plamondon	2c pts.	Old Peerage	100 p. c.	$21.00	$7.00	$14.00
1-29-10	39390	W. M. Wilkinson	2c pts.	Melrum	100 p. c.	21.00	7.00	14.00
1-29-10	39389	W. F. Lytle	2c pts.	"	100 p. c.	21.00	7.00	14.00
1-29-10	39388	Dick Brown	2c pts.	Pearl Spgs		21.00	5.00	16.00
1-26-10	39085	S. A. Abbott	1c qts.	Old Peerage	100 p. c.	10.50	3.50	7.00
11								
1-15-10	38020	Phil Mayer	1c pts.	" "	100 p. c.	10.00z	3.00	7.00
1-15-10	38019	Jim Craig	1c pts.	Green Ridge	100 p. c.	9.00	3.00	7.50
1-12-10	37696	J. H. McGivern	1c pts.	Mellrum	100 p. c.	10.00	3.00	7.00
1-12-10	37659	Mm. McNaught	1c pts.	D's D. S.		11.50	4.50	7.00
			1c pts.	Old Peerage	100 p. c.	11.50	4.50	7.00
1-12-10	37694	J. E. Winder	1c pts.	Old P. with R. C.		9.00	1.50	7.50
1-12-10	37698	C. H. Cave	1c pts.	"		9.00	1.50	7.50
1- 5-10	37180	Jim Craig	1c pts.	Green Ridge		9.00	1.50	7.50
1- 5-10	37177	J. H. McGivern	1c qts.	Mellrun	100 p. c.	10.00	3.00	7.00
1- 5-10	37172	G. W. Dupree	1c qts.	Old Peerage		9.00	2.00	7.00
1- 5-10	37173	C. H. Cave	1c pts.	Old P. with R. C.		9.00	2.00	7.00
1- 5-10	37174	C. H. Wheeler	1c qts.	Mellrun		9.00	2.00	7.00
1- 5-10	37175	C. H. Wheeler	1c pts.	Mellrun		9.00	1.50	7.00
1- 5-10	37176	Phil Mayer	1c pts.	Old Peer		10.00	3.00	7.00

1-22-10 38551 Wm. McNaught	1c pts. Melrun	8.00	1.00	7.00
	1c pts. Old Peerage	8.00	1.00	7.00
1-19-10 38271 J. E. Winder	1c pts. Old P. with R. C.	9.00	2.00	7.00
1-26-10 39086 Dick Brown	2c ½p. Old Beer	20.00	6.00	14.00
		$283.50	$75.50	$208.00
Less Commission		75.50		
Balance due ac. collections		$208.00		

13 EXHIBIT "B".

KANSAS CITY, MO., Aug. 6, 1910.

Mr. D. G. Cooley, Topeka, Kansas, Dr.,
To Dancinger Bros.

Dec.	31.	Old Beer & D. D. S.	net	14.00	
	31.	" " & Monet	"	14.00	
1910	31.	Melrun & Cedurodle	"	15.00	
Jan.	3.	2c pts. Melrun	"	16.00	
Jan.	28.	2c " Old Peer		20.00	
1-130-10.		ac. collections		283.50	
Aug.	1.	Assigned from Royal Brew		63.65	426.15

Credits.

Aug.	1.	Allow for Col. Fee	75.50	
Aug.	1.	Discount on ac	6.00	81.50
		Amount due		$344.65

Personally appeared before me, M. O. Dancinger, of the firm of Dancinger Brothers, who first being duly sworn, makes affidavit that the above statement is correct, after all due allowance made
12 for collection fee.

DANCINGER BROS.,
(Signed) By M. O. DANCINGER.

Subscribed and sworn to before me on this 6th day of Aug., 1910.

FLORA MICHARLIS,
Notary Public.

My commission expires April 14, 1914.

EXHIBIT "C."

KANSAS CITY, MO., Aug. 6, 1910.

D. G. Cooley, Topeka, Kans., in Account with The Royal Brewing Co.

	Casks 72 large.	No.		Mts.	Beer.
12-31-09	1	41533	Jack Henry	2.50	5.25
1- 6-10	1	41601	G. S. McCaslin	2.00	7.40
6	1	41619	H. H. Tobias	2.00	7.40
4	1	41570	E. L. Crow	2.00	8.75
5	1	41598	Phil Mayer	2.00	7.40
5	1	41597	G. W. Dupree	2.00xret	7.40

3	1	41567 ...out	D. Cooley	2.00	5.25
11	1	41691	L. Plamondon	2.00	7.75
11	1	41692	S. A. Abbott	2.00	7.40
12	1	41723	J. E. Widner	2.00	7.40
13	1	41730	G. S. McCaslin	2.00	7.40
14	1	41795	S. A. Abbott	2.00	8.25
14	1	41796	J. Prather	2.00	8.00
14	1	41798	W. B. Reed	2.00	8.00
14	1	41797	G. O. Taylor	2.00	8.00
15	1	41821	G. Dupree	2.00	7.40
24	1	42038	Phil Mayer	2.00	7.40
24	1	42039 ...out	D. G. Cooley	2.00	7.40
26	1	42078	W. F. Lytle	2.00	8.00
26	1	42077	L. Plamondon	2.00	7.75
28	1	42143	A. E. Buck	2.00	8.00
28	1	42121 ..out	D. G. Cooley	1.50	2.50
29	1	42165	H. H. Tobias BofL	2.00	7.40
29	1	6	Phil Mayer	2.00	7.40
29	1	7	G. S. McCaslin BofL	2.00	7.40
29	1	8	G. W. Dupree BofL	2.00	7.40
29	1	77	W. B. Reed	2.00	8.00
29	1	78	E. L. Crow	2.00	7.75
3–28		eCk. B-L 2-28-10		2.50	
				60.50	212.25
				272.75	

Credits.

6–21	1	Retd	2.00x	7.40
2– 7	1	1 mtg	1.50	
9	10	mts	20.00	
10	1	W. B. Reed	2.00	
5	2		4.00	
3–26	1		2.50x	
4–26		Cash		100.00
29	1	Retd	2.00x	7.40
			34.00	114.80
			148.80	
		Total amt due	123.95	
		Less commission fees	60.30	
				$63.65

We herein make assignment of all our interests and titles to the above account to Danciger Brothers for value received.

ROYAL BR'G CO.,

(Signed) By JOSEPH DANCIGER.

Evidence.

ABE DANCINGER testifies that the firm of Dancinger Brothers is a partnership composed of five brothers. That the members of this firm are Abe Dancinger, Dan Dancinger, Joseph Dancinger, Jacob Dancinger, and M. O. Dancinger. That D. G. Cooley called at their office in Kansas City, Missouri, and there made an oral contract with them to collect drafts which they would send to him for col-
14 lection, and would allow him a fee of from two to three dollars per draft for making the collection. That under this contract Mr. Cooley collected two hundred, eighty-three dollars and fifty cents. That the total amount of Mr. Cooley's fee for making this collection was seventy-five dollars and fifty cents, and that there was a balance of two hundred and eight dollars due the plaintiffs from Mr. Cooley after deducting his commission, or fee, for making the collection. That the said $208 became due the plaintiffs Feb. 1, 1910, and that exhibit "A" of plaintiffs' amended petition was an itemized statement of the drafts collected by Mr. Cooley and which was properly identified and introduced in evidence.

Mr. Dancinger testifies that Exhibit "A" is a correct itemized statement of the different amounts collected by the defendant on drafts sent to him for collection by the plaintiffs under the contract referred to above. He explains that the word "date," at the top of the statement, shows the date of shipment; that the word "No." meant the number of the shipment; that the names under the word "Consignee" were the names of the parties from whom the plaintiffs received orders; that the figures and printed matter under the word "invoice" showed the kind and quantity and character of the goods shipped and that the figures under the words "Amt. of Inv." showed the amount of the invoice, which was also the amount of the draft that was made and sent to Mr. Cooley for collection; that the figures under the words "Col. Fee" showed the collection
15 fee allowed the defendant for making the collection of the drafts on each draft separately; that the figures under the heading "Amt. Due" showed the net amount due after deducting the collection fee.

The witness further testified that the money due on the drafts which the plaintiffs sent to the defendant and which the defendant collected, was due the plaintiffs for shipments of goods which plaintiffs shipped to the parties listed under the word "Consignee" in Exhibit "A," attached to plaintiffs' amended petition and attached to this deposition. That the goods were sold in Kansas City, Missouri. That the plaintiffs received written orders, signed by the parties who wanted the shipments, in plaintiffs' office in Kansas City, Missouri, and that the plaintiffs delivered the shipments to the railroad there in Kansas City, Missouri, which was designated by the party who made the order.

(Abe Dancinger's deposition, pp. 1-5.)

The witness further testified that The Royal Brewing Company

was a corporation, and that the five Dancinger Brothers were its officers. That the brewery is located at Weston, Missouri, and the offices of the corporation are at Kansas City, Missouri. The witness testified that he is an officer of The Royal Brewing Company. That the defendant agreed to collect drafts for The Royal Brewing Company in the same contract that he agreed to collect drafts for the Dancinger Brothers.

The witness testified that the item of seventy-three dollars set forth in the second count of plaintiffs' amended petition is a
16 bill for goods shipped direct to D. G. Cooley, the defendant. That these shipments were made December 31, 1909, January 3, 1910, and January 25, 1910. That the value of the total amount shipped to the defendant was seventy-nine dollars; that there was a discount of six dollars on this, which left a net balance of seventy-three dollars. That this merchandise was shipped direct from the Dancinger Brothers on the orders of Mr. Cooley received by The Dancinger Brothers at Kansas City, Missouri. That the goods were sold in Kansas City and delivered to the railroad company at Kansas City, Missouri. That Mr. Cooley, the defendant, designated the railroad company to which the shipments were to be delivered. That the seventy-three dollars became due within thirty days after the shipments were made. An itemized statement of the shipments made and of the balance due The Royal Brewing Company for merchandise sold to Mr. Cooley is properly identified, marked Exhibit "B," and introduced in evidence and attached to the witness' deposition. The witness testifies that Exhibit "C," attached to plaintiffs' amended petition, is a statement of the amount due for drafts collected by the defendant, Mr. Cooley, covering various shipments made. That these shipments were made by the Royal Brewing Company and that the orders were received by the Royal Brewing Company and that this claim of The Royal Brewing Company was assigned to The Dancinger Brothers. That the Royal Brewing Company and the Dancinger Brothers, plaintiffs in
17 this action, run mutual accounts, and if this claim is collected the proceeds will be credited to the claim of Dancinger Brothers against The Royal Brewing Company.

(Abe Dancinger's Deposition, pp. 6-7.)

It was agreed that Abe Dancinger could attach to his deposition, and make the same a part of the deposition, bills-of-lading delivered to the defendant for each of the shipments to each of the consignees appearing in Exhibit "A" attached to the deposition and Exhibit "A" and attached to the plaintiffs' amended petition, have the same made a part of the deposition. They will be duplicate bills-of-lading issued to the railroad company. The orginals were attached to the drafts. The bills of lading of all of the goods set out in Exhibit "A," attached to the deposition, and Exhibit "A" attached to the amended petition, are properly identified and introduced in evidence. Mr. Dancinger testifies that the bills of lading are made in triplicate; that one is kept by the railroad company and the original and a duplicate copy is delivered to them, and that they attach the orig-

inal to the draft that they make on the consignee. The orders received from the consignees mentioned in Exhibit "A" are properly identified and introduced in evidence and marked Exhibit- 1 to 20. Mr. Dancinger testifies that the original orders came to them through the mail; that he filed the orders and made shipments to the parties on those written orders. He testifies that Exhibit "A," attached to the amended petition, and Exhibit "A," attached to the deposition, are made up from the original house tickets. That the orders that he received recited how the shipments should be made. He testifies that for each house ticket he made a draft for the amount shown on the ticket on the party who made the order for the goods mentioned on the house ticket and attached the draft to the bill of lading for the goods mentioned on the house ticket and the orders and sent them to Mr. Cooley, the defendant in this case, and that he had received nothing for the shipments listed in Exhibit "A" attached to the deposition and Exhibit "A" attached to plaintiffs' amended petition, and that plaintiff never received the bills of lading back from the defendant.

(Abe Dancinger's Deposition, pp. 13-15.)

Mr. Dancinger further testified that Exhibit "B" shows the goods sold direct to Mr. Cooley. That plaintiff received written orders from Mr. Cooley for items shipped to the defendant on Dec. 31, 1909, No. 17385, and shipment January 3rd and 28th, No. 17942. That plaintiff had an order, dated December 31st, amounting to $14.00, which he received from the defendant, and also the house ticket for it, which was attached to the order, and that on the order which he received from the defendant was the word "Cr.," and that that word meant that that sale was made on credit. That this shipment was made to Dick Brown and charged to D. G. Cooley, and that that order requested the shipment to be made in that way, and that he had the duplicate bill of lading for that shipment to Dick Brown. This order, with the house ticket attached to it, is properly introduced in evidence and attached to the deposition, marked "Exhibit No. 43." Mr. Dancinger further testified that he had an order from the defendant for another shipment made December 31st, appearing in Exhibit "B" for $14.00, which has the house ticket attached also and that this order had the words "Send draft to," "Ch'g'e" D. G. Cooley and the shipment was requested to be made to Jack Henry; that he made the shipment to Jack Henry as requested in the written order and charged it to D. G. Cooley, the defendant, and that the charge was $14.00 and that it appears in Exhibit "B." This order, with the original house ticket attached, is properly introduced in evidence and marked Exhibit "No. 44." He further testified that plaintiffs received a third order and made a shipment to him on December 31, 1909, and charged to him as it appears in Exhibit "B," the order for the third item of Exhibit "B," amounting to $15.00, together with the house ticket attached to it and a duplicate bill-of-lading or the express receipt evidencing the shipment, is property identified and introduced in evidence and marked Exhibit "No. 45." Mr. Dancinger

further testified that he received an order from the defendant over the phone for the item of January 3rd, 1910, for $16.00, and that this shipment was made to S. A. Abbott and charged to D. G. Cooley, that the memorandum "Telephone order" was placed on it at the time it was received and the order was filled out in the plaintiffs' office as it was taken by the witness. This order was properly introduced in evidence marked Exhibit "No. 46," and attached to the deposition. The order for the item of January 28th, 1910, for $20.00, together with the house ticket and duplicate bill of lading shipped to the defendant, is properly identified and introduced in evidence marked Exhibit "No. 47," and attached to the deposition. Receipts from the express company for goods shipped to the defendant by express are properly introduced in evidence and marked Exhibits "No. 49" to "52," inclusive, and attached to the deposition. The witness testifies that he of his own knowledge knew that these orders which he received from the defendant, were filed and the goods delivered to him as requested in these orders.

(Abe Danciger's Deposition, pp. 15-18.)

Deposition of M. O. Danciger.

M. O. DANCINGER is called to the stand and testifies that he had called upon the defendant, D. G. Cooley, at several different times to collect the claims due the plaintiffs in this case, including claims due the Royal Brewing Company, assigned to the plaintiff. That he presented the claim marked Exhibit "A" to the defendant and that the defendant admitted the correctness of the amount and admitted that he owed the plaintiffs the $108 set forth in that account and that Mr. Cooley promised to pay the $108 and said that he had used the money and wanted the plaintiffs to wait on him. M. O. Danciger also said that he called upon the defendant, D. G. Cooley, after that and presented him his personal account and also the account for the drafts which he had collected and that Mr. Cooley said that he would pay the account in full and that defendant paid $100.00 at that time and this was credited on the defendant's account with the Royal Brewing Company. The witness further testified that he called upon the defendant in Topeka, Kansas, and that the defendant admitted the correctness of the account set forth in Exhibit "A" and admitted that he had collected all of the money represented by said account, and he promised to pay it over as soon as he could sell his franchise and some ball players. That the defendant's only excuse for not paying the money over was that he needed the money to keep his ball team on the road and that defendant said that he was using the money for that purpose. The witness also testified that he also presented Exhibit "B," which was defendant's personal account for goods sold him, and that the defendant promised to pay it. That the defendant did not question the correctness of the account, and that defendant promised to pay the entire account of $73.00 and admitted that was the amount

due on the account set forth in Exhibit "B." The witness also testified that that he presented defendant's accounts with The Royal Brewing Company, which were assigned to the plaintiffs, and that the defendant admitted the correctness of these accounts and promised to pay them. The witness further testified that he was an officer of the Royal Brewing Company.

22 On -ross examination Mr. Dancinger testified that the defendant paid the $100.00 about April 26th and that the witness had business transactions with him after that time.

On re-direct examination Mr. Dancinger testified that the $100.00 was credited on the Royal Brewing Company's account and that he saw the defendant after that and before this suit was commenced and that Mr. Cooley admitted the various items of indebtedness that were sued on and asked for more time. Then the plaintiffs brought this suit.

(Abe Dancinger's Deposition, pp. 19-21.)

Deposition of Joseph Dancinger.

JOSEPH DANCINGER testified that he was one of the plaintiffs and also an officer of the Royal Brewing Company, and that he made an assignment of the claim of the Royal Brewing Company to the plaintiffs in this case against the defendant. That the balance of 63.65 shown in exhibit "C" was made up of shipments that The Royal Brewing Company made direct to Mr. Cooley and also of drafts sent him to collect on, and the following items which appear in exhibit "C" of the amended petition, to-wit:

January	3rd, 1910,	Empties	$2.00,	beer	$5.25
"	24th, 1910,	"	2.00,	"	7.40
"	28th, 1910,	"	1.50,	"	2.50

The witness testified that the other items in exhibit "C", attached to plaintiffs' amended petition, consisted of drafts with bills-of-lading attached, sent to D. G. Cooley for collection. (Deposition, pp. 22-23.)

23 *Deposition of J. W. Hoffman.*

J. W. HOFFMAN testified that he was the credit man for the plaintiffs and that exhibit "A", attached to plaintiffs' amended petition and to Mr. Abe Dancinger's deposition, was prepared by him, and that it was prepared from the house tickets and orders which were made a part of the deposition of Mr. Abe Dancinger, and appearing as a part of his deposition, and that it is a correct list of the parties upon whom drafts were made and the amounts and the dates and the quantity and the price. (Deposition, p. 24.)

Mr. STRONG testified on behalf of the plaintiffs and testified that he was present when Mr. Cooley made his contract with the Dan-

cinger Brothers and The Royal Brewing Company to collect drafts for them. And thereupon the plaintiffs rested their case; and thereupon the defendant demurred to the first and fourth counts of plaintiffs' cause of action.

And thereupon the court sustained the demurrer as to the first and fourth counts of the plaintiff's cause of action.

And thereupon the defendant testified in support of his defense to the second and third counts of the plaintiffs' cause of action, and rested.

The plaintiffs introduced no testimony in rebuttal.

At the close of all of the testimony the plaintiff requested the court in writing to instruct the jury as follows:

24 The plaintiff requests the court to instruct the jury as follows:

* * * * * * *

3. Under the law intoxicating liquor is a legitimate article of interstate commerce. It may be purchased or sold in one state where the purchase or sale is lawful under the laws of that state and shipped into another state where the sale, or purchase, if made there, would be unlawful, and the seller may collect for such liquor in the courts of the state where such sale would have been unlawful if made there.

4. If the goods and merchandise for which the plaintiffs are seeking to recover in this case were sold by the plaintiffs upon orders received at their place of business in the State of Missouri,

25 subject to their approval or rejection, and pursuant to such orders the goods were delivered by the plaintiffs to a railroad or express company in the State of Missouri consigned to the persons in Kansas from whom such orders were received, then, I instruct you that such sales were made in the State of Missouri, and if such sales were lawful in Missouri, the plaintiffs are entitled to recover for such goods in the State of Kansas.

5. If sales of liquor were lawfully made in the State of Missouri, as before stated in these instructions, and the defendant became the agent of the plaintiffs for the collection of drafts drawn upon the persons in Kansas sending such orders and to whom such consignments were made, pursuant to a contract of agency made in the State of Missouri, and the defendant collected said drafts and retained the money so collected, then plaintiffs are entitled to recover in this case from the defendant whatever sums may be due and unpaid from defendant by reason of the collection of said drafts less the commission or compensation he was entitled to receive for making such collections.

Each and all of which instructions were refused to be given, and were not given by the court, to each of which rulings the plaintiffs duly and separately excepted at the time.

The court did instruct the jury as follows, to the giving of which instructions the plaintiff excepted separately at the time, said instructions being as follows:

Instructions.

The Court: Gentlemen of the Jury:

* * * * * * *

26–28 As to the first and fourth counts, which the plaintiffs claim to be due for the collection of drafts, the court has taken those from the jury, and you are instructed that you will pay no attention to those two counts in your deliberations in the jury room.

* * * * * * *

29 Thereafter the jury retired to their room on the 7th day of December, 1915, and returned their verdict in favor of the defendant, D. G. Cooley, and against the plaintiffs.

And thereupon the plaintiffs' on the 8th day of December, 1915, filed their motion for a new trial, which motion, omitting the caption, is in words and figures as follows, to-wit:

"And now comes the said plaintiffs and moves the court to vacate the verdict rendered by the jury in this action, on the 7th day of December, A. D. 1914, and grant a new trial of this action, for the following causes, which affect materially their substantial rights, to-wit:

30 "First. Irregularities in the proceedings of the court by which said plaintiffs were prevented from having a fair trial.

"Second. Irregularities in the proceedings of the jury by which plaintiffs were prevented from having a fair trial.

"Third. Certain orders were made by the court by which said plaintiffs were prevented from having a fair trial.

"Fourth. Abuse of the discretion of the court and jury by which said plaintiffs were prevented from having a fair trial.

"Fifth. Irregularities in the proceedings of the prevailing party by which said plaintiffs were prevented from having a fair trial.

"Sixth. Misconduct of the jury.

"Seventh. Misconduct of the prevailing party.

"Eighth. Accident and surprise which ordinary prudence could not have guarded against.

"Ninth. Said verdict is not supported by sufficient evidence.

"Tenth. Said verdict is contrary to law.

"Eleventh. Newly discovered evidence material for plaintiffs and which they could not, with reasonable diligence, have discovered.

"Twelfth. Error of law occurring at the trial, and excepted to by plaintiffs at the time."

And thereupon on the 2nd day of January, 1915, the court overruled the motion for a new trial and rendered judgment in favor of the defendant, to which plaintiff duly excepted at the time.

The journal entry of said judgment and the overruling of
31 plaintiffs' motion for a new trial, omitting the caption and signature, is in words and figures as follows, to-wit:

"Be It Remembered, That on this 7th day of December, 1914, it being one of the regular days of the September, A. D., 1914,

term of court, Honorable A. W. Dana, Judge, presiding, upon the second amended petition of the plaintiffs and answer of the defendant and reply of plaintiffs, Clyde Cowgill and R. E. Jacobs, the defendant appearing in person and by his attorneys, Hungate and Heinz.

"Thereupon the parties announced themselves ready for trial; thereupon came A. F. Stevens, C. C. Fosnacht, George W. Greenwood, S. M. Dickey, H. S. Thomas, D. Greenstead, George Hamaker, A. S. Johnson, Perry Davis, J. R. O'Neal, B. F. Bunkhouser, twelve true and lawful men of the body of Shawnee County, who were duly impanneled and sworn to try said cause. Thereupon plaintiffs introduced their evidence and rested. Thereupon the defendant filed his demurrer to the evidence of plaintiffs upon the first and fourth causes of action, set out in said second amended petition, upon the ground that the evidence upon said first and fourth causes of action fails to sustain a cause of action in favor of the plaintiffs and against the defendant.

After listening to the arguments of counsel and being fully advised in the premises, the court finds that the evidence upon the first and fourth counts of said second amended petition does not prove a cause of action in favor of the plaintiff and against the defendant.

It is therefore by the court considered, ordered and adjudged that the said demurrer to the evidence upon the first and fourth counts be and the same are hereby sustained and the case, so far as the first and fourth counts are concerned, is taken by the court from the further consideration of the jury and that the defendant have and recover judgment of and from the plaintiffs for the costs herein expended upon the said first and fourth counts of said petition; to which judgment of the court the plaintiffs duly excepted.

Thereupon defendant introduced his evidence in defense
32 of the second and third counts in said second amended petition and rested. Thereupon the court instructed the jury upon the law as to the second and third counts of said petition. After listening to the arguments of counsel the jury retired to their jury room in charge of their sworn bailiff to consider their verdict. Thereafter the jury returned into the court with their verdict, which is in words and figures as follows, to-wit:

"We, the jury impanneled and sworn in the above entitled case, do, upon our oaths, find for the defendant.

S. M. DICKEY, *Foreman.*"

Thereupon the jury was discharged from further consideration of said cause.

"It is therefore by the court considered, ordered and adjudged upon the verdict of the jury herein that the defendant have and recover from the plaintiffs his costs expended herein upon said second and third causes of action as set out in the second amended petition and that the plaintiffs take nothing by reason of this action."

To this judgment of the court the plaintiffs duly excepted at the time.

On the 13th day of January, 1915, notice of appeal was duly served by the plaintiffs on the defendant and said notice and proof of service thereon was duly filed on the same day.

The above and foregoing is a true and correct abstract of
33 the record in the above entitled cause.

R. E. JACOBS,
Kansas City, Missouri;
C. P. COWGILL,
Topeka, Kansas;
Attorneys for the Plaintiffs.

Specifications of Error.

1. The court erred in sustaining the demurrer of the defendant to the evidence of the first and fourth counts of the plaintiffs' cause of action.

2. The court erred in refusing to give each of the instructions requested by the plaintiffs.

3. The court erred in overruling the motion of the plaintiffs for a new trial.

4. The court erred in rendering judgment against the plaintiff upon the verdict of the jury.

R. E. JACOBS,
C. P. COWGILL,
Attorneys for Appellants.

34 19945.

Filed Apr. 3, 1916. D. A. Valentine, Clerk Supreme Court.

In the Supreme Court of the State of Kansas.

ABE DANCINGER, DAN DANCINGER, JOE DANCINGER, M. O. Dancinger, and Jack Dancinger, Doing Business as a Copartnership under the Firm-name and Style of Dancinger Brothers, Appellants,

vs.

D. G. COOLEY, Appellee.

Appeal from District Court of Shawnee County, First Division.

Hon. A. W. Dana, Judge.

Counter Abstract and Brief of Appellee.

Otis E. Hungate, Attorney for Appellee.

35 In the Supreme Court of the State of Kansas.

ABE DANCINGER, DAN DANCINGER, JOE DANCINGER, M. O. DANcinger, and Jack Dancinger, Doing Business as a Copartnership under the Firm-name and Style of Dancinger Brothers, Appellants,

vs.

D. G. COOLEY, Appellee.

Counter Abstract of Appellee.

Appellants in their abstract fail to set out the answer filed in the case. In his answer to the first cause of action appellee alleged:

"First. That he denies each and every, all and singular, the material allegations therein contained which are not hereinafter expressly admitted.

Second. Defendant specifically denies that he ever entered into any contract with the plaintiffs whereby he agreed to make collections for the plaintiffs and further denies that he collected and retained any monies upon collection belonging to plaintiffs, and further denies that he was ever constituted and appointed by
36 the plaintiffs as their agent for the purpose of making collections, as alleged in said second amended petition."

For his answer to the second cause of action sued upon defendant first generally denied the allegations of the amended petition and for his fourth defense alleged: "Defendant alleges that if plaintiffs ever sold and delivered to defendant any of the whiskey mentioned in the second count in the second amended petition, the same has been fully paid for by the defendant prior to the bringing of this action."

The defendant for his answer to the third cause of action first generally denied the allegation of plaintiffs second amended petition and for his fourth defense alleged: "Defendant alleges that if the Royal Brewing Company ever sold and delivered to defendant any of the beer mentioned in the third cause of action set out in plaintiffs' second amended petition and in Exhibit C attached to plaintiffs' amended petition, that the defendant has fully paid for the same prior to the commencement of this suit."

In his answer to the fourth cause of action defendant first generally denied the allegations of the second amended petition and for his second defense alleged: "Defendant specifically denies that he ever entered into any contract with the Royal Brewing Company whereby he agreed to make any collections for it and further denies that he ever collected or retained any monies upon collections belonging to the Royal Brewing Company, and further denies that he ever was constituted and appointed by the Royal Brewing Company its agent for the purpose of making collections as alleged in the fourth cause of action of said second amended petition."

The defendant verified the answer to the first and fourth causes of action which denied the agency.

Appellants in their abstract further fail to set out all of the evidence introduced on behalf of the plaintiffs.

37 *Testimony of Abe Dancinger.*

Mr. Abe Dancinger, in addition to the testimony set out in appellants' abstract (Appellants' abstract, 13-20) testified as follows in his deposition: "Our firm had an arrangement with Mr. Cooley about the collection of drafts. We were to send him drafts with the bills of lading attached covering shipments made to customers and we were to allow him for collecting them from two dollars to three dollars per draft. We agreed to allow him on goods where we made a liberal profit a larger collection fee than on goods where we did not make so large a profit. The amount of the collection was made to depend upon the character of goods covered by the draft. At the time of the different collections we did not have any other bank or any one else collecting for us in Topeka, because the banks refused to collect the drafts. The reasons for making this arrangement with Mr. Cooley were that we could not secure any bank in the town to collect our drafts and in such cases we usually arranged with some outside person to handle our drafts for collection."

Cross-examination:

"I never saw Mr. Cooley collect any money for any of the items set out in "Exhibit A" of the petition. We claim we sent Mr. Cooley a special bill of lading with a special draft on each of the parties, marked consignee, in this "Exhibit A." Our instructions to Mr. Cooley were that the bill of lading was not to be delivered until the draft was collected. Mr. Cooley was not supposed to deliver the bills of lading until the drafts which are attached to them were paid. His instructions were not to. We sent the drafts and bills of lading attached to Mr. Cooley for collection."

Attached to the deposition of Mr. Abe Dancinger is one of the triplicate set of the bills of lading for each shipment of whiskey by Dancinger Brothers and beer by the Royal Brewing Company for
38 which drafts were drawn and sent to appellee the proceeds of which drafts appellants sought recovery in their first and fourth causes of action. These bills of lading constituted the contract of shipment between appellants and the railroad company or express company as the case might be. In each instance the bill of lading sets out the receipt of the goods by the carrier from Dancinger Brothers at Kansas City, Mo., and also recites that the goods are "consigned to order of Dancinger Brothers, destination Topeka, State of Kansas." Each bill of lading also contained the following provision: "The surrender of the original order, bill of lading properly endorsed shall be required before the delivery of the property."

The foregoing is a true and correct counter-abstract of the record in the above-entitled case so far as necessary to fully present the questions brought to this Court for review.

OITS E. HUNGATE,
Attorney for Appellee.

39 And afterwards, and on the 3rd day of April 1916, the same being one of the regular judicial days of the January term 1916, of the Supreme Court of the State of Kansas, before said court in session in the Supreme Court room in the city of Topeka, the following proceedings, among others, was had, and entered of record as follows, to-wit:

40 In the Supreme Court of the State of Kansas, Topeka, Kansas, April 3, 1916.

No. 19945.

ABE DANCIGER et al., Appellants,
vs.
D. G. COOLEY, Appellee.

Journal Entry of Submission.

This cause comes on to be heard upon the notice of appeal, transcript of the judgment and abstract of the record from Division No. 1 of the Shawnee County District Court. And thereupon said cause is submitted on brief of counsel for both parties and taken under advisement by the court.

41 And afterwards, and on the 6th day of May, 1916, the same being one of the regular judicial days of the January term 1916, of the Supreme Court of the state of Kansas, the following proceedings among others was had, and entered of record in the words and figures as follows to-wit:

42 In the Supreme Court of the State of Kansas, Topeka, Kansas, May 6, 1916.

No. 19945.

ABE DANCIGER et al., Appellants,
vs.
D. G. COOLEY, Appellee.

Journal Entry of Judgment.

This cause comes on for decision, and thereupon it is ordered and adjudged that the judgment of the court below be affirmed. It is further ordered that the appellants pay the costs of this appeal in this court taxed at $—, and hereof let execution issue.

43 And afterwards and on the 6th day of May, 1916, there was filed in the office of the Clerk of the Supreme Court of the State of Kansas, the court's written opinion, together with the syllabus thereto, which syllabus and opinion are in the words and figures as follows to-wit:

44 No. 19,945.

ABE DANCINGER et al., Partners, etc., Appellants,
v.
D. G. COOLEY, Appellee.

Appeal from Shawnee County (Division No. 1).

Affirmed.

Syllabus of the Court.

MASON, *J.:*

1. A controversy as to the application of a payment made by a debtor held to be settled by the verdict and judgment.

2. A principal who employs an agent to make collections under circumstances which make the act a violation of the criminal law, cannot maintain an action for the recovery of the amount collected.

3. Under the circumstances of this case it will not be presumed that the sale of intoxicating liquors is forbidden by the laws of Missouri.

4. One who ships liquor to his own order and delivers the bill of lading to another to enable him to receive it for his own use, thereby violates the provision of the Kansas statute forbidding a person to whom intoxicating liquor has been consigned to give to any other person an order upon the carrier for it, with the purpose of enabling him to receive it for himself.

5. The statute referred to in the foregoing paragraph, as applied to a shipment from another state into this, under the circumstances there stated, is not invalid as involving an undue interference with interstate commerce, irrespective of the provision of the Webb-Kenyon act.

45 6. Where liquor is shipped into this state to the order of the shipper, his representative who collects the purchase price and delivers to the purchaser the bill of lading, thereby violates the act of congress which provides a punishment for any person who, in connection with the interstate transportation of intoxicating liquor, shall collect the purchase price from the consignee, or act as the agent of the buyer for the purpose of completing the sale thereof, saving only in the actual transportation and delivery of the same.

All the justices concurring.

A true copy.
Attest:

[Seal Supreme Court of the State of Kansas.]

D. A. VALENTINE,
Clerk Supreme Court.

46 No. 19,945.

The opinion of the court was delivered by

MASON, *J.*:

Danciger Brothers sued D. G. Cooley upon two accounts for liquor sold to him, in one instance by the plaintiffs and in the other by a dealer who assigned the claim to the plaintiffs; and also upon two similar accounts for collections made by him, for the plaintiffs and the other dealer, from purchasers of liquor. The defendant pleaded payment of the accounts for liquor sold to him and this issue was submitted to a jury, which found in his favor. Upon the other accounts the court sustained a demurrer to the plaintiffs' evidence. Judgment was rendered for the defendant, from which the plaintiffs appeal.

(1) The controversy regarding payment depended upon what application was made of a remittance by the defendant. The defendant's claim was that he had directed that it should be applied to the accounts for liquor sold to himself. The plaintiffs contended that no specific directions had been given and that application had been properly made upon the collection account. The court instructed on the law of the matter substantially as agreed to by the parties, and the verdict of the jury is conclusive upon this feature of the case, which is not affected by the legal questions hereinafter discussed. This part of the judgment is affirmed, and constitutes an adjudication that the remittance referred to should have been applied first to the personal account of the defendant for liquor purchased by him. If the plaintiffs should finally prevail upon the other branch of the case they would be entitled to a larger recovery thereon to the extent of the amount so applied.

(2) The demurrer to the plaintiff's evidence upon the other branch of the case was sustained upon the theory that the liquor dealers and the defendant were engaged in violating the laws
47 relating to the liquor traffic, that the collections made were the proceeds of such violation, and that the courts will not lend their aid to the apportionment of the profits of the illegal transaction. The claim assigned to the plaintiffs is of the same character in all respects as that which accrued to them originally, and a description of the circumstances out of which the latter grew will be sufficient. The plaintiffs, according to their evidence, were engaged in selling beer and whiskey in Kansas City, Mo. They received a number of written orders from customers in Topeka. In each instance they shipped the liquor by freight to their own order, mailing the bill of lading to the defendant, with instructions to deliver it to the person who sent the order, upon payment of an accompanying draft for the price. This arrangement was made because the banks had refused to collect their drafts. The defendant's commission for his services varied with the class of goods, but averaged a little over twenty-five per cent of the collections.

If the resulting transactions amounted to the illegal sales of liquor in Kansas, or otherwise violated the penal laws of the state

or nation, no recovery of the amount collected by the plaintiff can be had. There is a difference of judicial opinion on the question whether one who as the agent or partner of a wrongdoer participates in a contract in violation of law will be required to account to his principal or associate for any proceeds of it that have come into his hands.

(15 A. & E. Encycl. of L. 1009-1011;
9 Cyc. 557-560;
Note, 113 Am. St. Rep. 732-734.)

But in this state the matter is settled by the decision in Alexander v. Barker, 64 Kan. 395, 67 Pac. 829, where it is said:

"The rule is that when persons enter into an illegal contract, and one of them receives the profits or other advantages
48 arising therefrom, the courts will not compel him to account therefor, as in such case the right of the other to a share therein, or to the whole of it, if such were the agreement, would have to be based upon the illegal contract, and to permit him to recover it would be, in reality, an enforcement of the illegal scheme. The law therefore leaves him where it finds him" (p. 402).

(3) The defendant suggests that even if the sale of the liquor is regarded as completed in Missouri it must be treated as illegal because, although the plaintiffs pleaded that the law of that state permits such sales, no proof was offered on the subject, and in the absence of a showing to the contrary the court must presume statutes similar to our own to have been adopted there. (Bershears v. Nelson, 80 Kan. 194, 101 Pac. 1011.) The general denial of the answer can hardly be regarded as intended to assert that the sale of intoxicating liquors is forbidden by the laws of Missouri. The trial court obviously did not put that construction on it or the entire case would have been taken from the jury. The powers of this court on review have been broadened since the decision last cited by a provision of the present code that "in any case pending before it the court shall render such final judgment as it deems that justice requires." (Civ. Code, §581; Ratliff v. Railroad Co., 86 Kan. 938, 122 Pac. 1023.) The policy of another state with respect to a matter of so much public interest as that relating to the control of the liquor traffic is so widely and generally known that it is hardly to be classed as falling within the ordinary presumption applied to local statutes. The legal questions presented will be considered in the light of the known fact that Missouri is not a prohibition state. However, if the sale was an integral part of an entire transaction in interstate commerce, it would seem to be protected against interfer-
ence by either state.

49 (4) The defendant argues that as the plaintiffs shipped the liquor to their own order, and retained control of it until the delivery of the bill of lading, upon payment of the purchase price, the title passed in Kansas, and the sales were made in this state and were therefore illegal. The Webb-Kenyon act (Part 1, 37 U. S. Stat. at large, ch. 90, p. 699, 4 U. S. Comp. Stat. 1913, § 8739) has no bearing on the case, as it was passed after the claims sued

upon had accrued. The Wilson act (26 U. S. Stat. at Large, ch. 728, pp. 313, 4 U. S. Comp. Stat. 1913, § 8738) gives a state no power to forbid the shipping of intoxicating liquors by a nonresident seller to a resident purchaser, and its delivery to the latter upon his payment of the purchase price. The interstate character of the transaction is not controlled by the time the title passes or the property ceases to be at the risk of the seller (American Express Co. v. Iowa, 196 U. S. 133), nor by a legislative declaration that the place of delivery and payment shall be deemed the place of sale (Adams Express Co. v. Kentucky, 206 U. S. 129), nor by the fact that the seller has an agent on the ground through whom the delivery is made. (Caldwell v. North Carolina, 187 U. S. 622.) "The right to send liquors from one State into another, and the act of sending the same, is interstate Commerce, the regulation whereof has been committed by the Constitution of the United States to Congress, and, hence, * * * a state law which denies such a right, or substantially interferes with or hampers the same, is in conflict with the Constitution of the United States." (Vance v. N. A. Vandercook Company, 170 U. S. 438, 444. See, also, Rossi v. Pennsylvania, 238 U. S. 62.) The Wilson law gave to the state no jurisdiction over liquor shipped in from outside its boundaries, until a delivery to the consignee was effected. (Heyman v. Southern Railway Co., 203 U. S. 270.) The state could not effectively forbid the making and carrying out of an agreement by the plaintiffs with a purchaser to cause liquor to be transported from Kansas City, Mo., to
50 Topeka, and there delivered to him upon payment of the purchase price. But it does not follow that the methods adopted for the execution of such an arrangement are wholly beyond the reach of state legislation. The power given the state by the Wilson act to forbid the sale of intoxicating liquors even in the original package, by one to whom they are sent in the course of interstate commerce, would be of little practical effect if the consignee could authorize their delivery by the carrier to some other person. To meet this situation the Kansas legislature has enacted that one to whom intoxicating liquor has been consigned shall not give to any other person an order on the carrier for it, with the purpose of enabling him to receive it for himself, or for any one other than the consignee. (Gen. Stat. 1909, §4398.) Here the liquor was not consigned to the purchaser, but to the order of the plaintiffs. Within the meaning of the act cited the plaintiffs were the consignees. By surrendering the bills of lading (presumably with their endorsement) they in effect gave an order on the carrier for the delivery of the liquor to a person to whom it was not consigned.

(5) The state may prevent the sale in interstate commerce of oleomargarine, harmless in itself, and a legitimate subject of trade, if it is colored in imitation of butter, so that it lends itself readily to the perpetration of a fraud. (Plumley v. Massachusetts, 155 U. S. 461. And it may penalize the possession of game birds taken outside of the state, notwithstanding a restriction is thereby placed upon interstate commerce, where such a regulation is necessary to prevent the evasion of local game laws. (Silz v. Hesterberg, 211

U. S. 31.) It may also prohibit the sales of innocuous beverages because to allow them to be legally sold would impede the enforcement of the laws against intoxicants, on account of the resemblance between them. (Purity Extract Co. v. Lynch, 226 U. S. 192.) By a parity of reasoning it should be held that in the exercise of its police power, in order to prevent a sale of liquor being made under color of a delivery to one who had already purchased it, the
51 state may forbid a transfer by the person to whom it is consigned of the right to receive it from the carrier.

While the Wilson act does not give the local authorities absolute jurisdiction of intoxicating liquors shipped into the state until they are delivered to the consignee, it does affect the rights of the parties to an interstate transaction prior to such delivery. One engaged in interstate commerce may employ a solicitor in aid thereof, whose activities can not be restricted by state legislation. (Robbins v. Shelby Taxing District, 120 U. S. 489.) A dealer is declared to have a constitutional right, notwithstanding the Wilson act, to sell and ship liquor into another state to be delivered to the buyer for his own use, free from state interference, a right which except for congressional action carried with it the incidental right to solicit such business within that state. And yet because of the Wilson act the state may punish the solicitors of such a dealer for taking within its boundaries orders for liquor to be filled in accordance with his constitutional privilege, one of the reasons given for this conclusion being that a contrary doctrine "would be repugnant to the plain spirit of the Wilson act." (Delamater v. South Dakota, 205 U. S. 93, 99.) We think it would be repugnant to the plain spirit of that statute to hold that the state has no power to prevent one who has shipped in liquor consigned to himself, from giving an order to the carrier to deliver it to some one else. The protection that might be given the conduct in question as an act of interstate commerce is also restricted by the federal statute hereinafter referred to. We conclude that the arrangement entered into and carried out by the plaintiffs and the defendant was in violation of the laws of the state and that no recovery can be based upon it.

(6) The arrangement between the liquor dealers and their Topeka agent involved a violation of the act of congress including these provisions:

52 "Any railroad company, express company, or other common carrier, or any other person who, in connection with the transportation of any spirituous, vinous, malted, fermented, or other intoxicating liquor of any kind, from one State * * * into any other State, * * * shall collect the purchase price or any part thereof, before, on, or after delivery, from the consignee, or from any other person, or shall in any manner act as the agent of the buyer or seller of any such liquor, for the purpose of buying or selling or completing the sale thereof, saving only in the actual transportation and delivery of the same, shall be fined not more than five thousand dollars." (Part 1, 35 U. S. Stat. at Large, ch. 321, § 239, p. 1136, 4 U. S. Comp. Stat. 1913, § 10409.)

The defendant collected the purchase price of the liquor in con-

nection with its transportation from Missouri to Kansas. His act was a step in the proceedings by which a transfer of the liquor was effected from the dealer to the purchaser. The interstate character of the transaction is not affected by the question as to when the title passed. But wherever the sale may be regarded as taking place, it was not completed so long as the shipper had the absolute control of the liquor. The transfer of the bill of lading was necessary to its completion. When the defendant collected a draft as a condition to the surrender of the bill of lading he acted as the agent of the seller for the purpose of completing the sale, otherwise than in the actual transfer and delivery of the liquor, and thereby violated the provision of the statute.

The judgment is affirmed.

All the Justices concurring.

A true copy.
Attest:

[Seal Supreme Court, State of Kansas.]

D. A. VALENTINE,
Clerk Supreme Court.

53 And afterwards, and on the 26th day of May, 1915, there was filed in the office of the Clerk of the Supreme Court of the state of Kansas, a petition for a rehearing, which is in the words and figures as follows, to-wit:—

54 In the Supreme Court of Kansas.

#19945.

ABE DANCIGER et al., Appellants,
vs.
D. G. COOLEY, Appellee.

Motion for Rehearing, Brief and Argument.

I.

Appellants move the court to grant them a rehearing in this cause for the reason that the decision in same is based in part on the fact that the Court found that the collections of drafts involved a violation of Sec. 239, of the Penal Code of the U. S. For the reason, no doubt, that no where in the case was such a contention made, and because the case was not tried on that theory, the question was not considered or briefed by counsel.

Sec. 239 is a Federal Statute and the construction placed on it by the officers whose duty it is to enforce it, and by the Federal Courts, should be followed by the State Courts. The Secretary of the Treasury, the Attorney General of the United States, the United States

Circuit Court of Appeals (8th), as a Court of last resort in the case, and three Federal District Courts have passed on this law and hold that it does not apply to a bank or to a private party, such as appellee in this case. These rulings and decisions were not mentioned in the Court's opinion, and were, we presume, not considered. A rehearing should be granted so that these decisions may be considered, and that so grave an error, or conflict may be corrected, and the decision in its present form not permitted to stand.

55

II.

Appellants move the Court for a rehearing in this cause, because the decision is in sharp conflict with the case of Rosenberger vs. Missouri, not reported yet, decided by the United States Supreme Court, after the submission of this cause, and two weeks before this case was decided. The Rosenberger decision expressly approves that portion of the decision in Amer. Exp. Co., vs. Iowa, 196 U. S. 133, which held that Shipper's Order liquor shipments (as in the instant case) were protected by Commerce clause, and could not be interfered with by the State.

The Rosenberger case held that the Commerce Clause covered with the greatest freedom all cases of interstate liquor shipments, and in addition it protected all agreements having a proper relation to the subject. The Court, in holding that C. O. D. shipments could not be prohibited by State law, in effect held, that the method of the interstate shipment was beyond State control.

The Rosenberger case held that a statute aimed at preventing fraud, imposition or abuse of interstate Commerce, was unconstitutional, if by its construction it might include cases where there was no fraud or abuse. That is the instant case exactly and that is the precise argument of this Court in the opinion. On this point, if the Rosenberger case, which is controlling, is followed, the instant decision must be abandoned.

This Court found authority for its ruling in Delameter vs. South Dakota, 205 U. S. 93. The Rosenberger case limits the Delameter case so that the construction of it made by this court, can at once be seen to have been unwarranted. The Rosenberger case expressly holds that the Delameter case did not change the rulings, law or principles as we have heretofore set them out, and hence the force of the Delameter case must be restricted to the facts before the Court in that case.

56 A copy of the Rosenberger opinion is attached. The instant decision, and the arguments thereof, cannot possibly be reconciled with it. A rehearing ought to be granted for the reconsideration of this cause in the light of the Rosenberger decision.

III.

This Court found the State law, Sec. 4399, G. S. Kansas, to be valid and applicable by virtue of the authority granted the States by Congress under the Wilson Act. Now if this legislation is valid

solely by virtue of the Wilson Act, then if Congress were, subsequent to the Wilson Act to pass another act prescribing in what cases it should be unlawful for any person other than the consignee to get interstate shipments, and in effect providing that it should be lawful for the consignee to give a written order to get interstate liquor shipments, then the State legislation conflicting therewith and prohibiting such written orders would be void.

Because such State legislation bases its legality on congressional acts, the Wilson law, and if the same law making body, which passed the Wilson Act, passed a later act, legalizing the conduct in the instant case, then the later act controls and the State law having lost the power under which it was sustainable is void.

Congress has passed such a law. In 1909 Sec. 238, of the Penal Code was passed. It prohibited shipments to fictitious consignees and legislated expressly on the subject of consignees of interstate liquor shipments. It expressly excepted from its prohibitive terms, and thereby legalized the same, the giving of a written order for liquor to a party other than the consignee. This the State law prohibits and thus conflicts with the Federal Act. The State law must yield, this being an interstate shipment.

57 Although Sec. 239 was not called to the Court's attention, it considered same in the opinion and as Section 238, passed at the same time, is controlling on the case and of utmost importance, the Court ought to give it consideration. The Supreme Courts of Tennessee and Oklahoma have sustained the contention we make on this point, and same is, therefore, of apparent merit.

We sincerely pray the Court not to permit the instant decision to stand without the fullest consideration of these propositions. The decision, which strikes down the interstate Shipper's Order liquor business, is tremendously important, and ought not to be sustained, except upon consideration of all the decisions and all the Federal laws applicable thereto—a consideration, as we have pointed out, which was not had in this case.

Because a recent and controlling decision, both on the facts and the logic used by this court, has been handed down by the U. S. Supreme Court. Because Sec. 238 is a Federal Statute and the Federal constructions of same are unanimously opposed to the decision of this Court. Because, even if Sec. 4399 was otherwise valid, it would be void because in conflict with Federal Statute Sec. 238, which was entirely overlooked by this Court. And because of the importance of the case, we respectfully and sincerely pray that the court will rehear same, so that it may be fully argued and briefed with the additional light of the Rosenberger opinion, the instant opinion, the opinions construing Sec. 239, and Sec. 238 of the Penal Code before us.

(The "Rosenberger case is now reported in the Supreme Court Reporter.")

58 And afterwards, and on the 8th day of July, 1916, the same being one of the regular judicial days of the January term

1916, of the Supreme Court of the State of Kansas, the following proceedings, among others, was had and entered of record in the words and figures, as follows to-wit:

59 In the Supreme Court of the State of Kansas, Topeka, Saturday, July 8, 1916.

No. 19945.

ABE DANCIGER et al., Appellants,
vs.
D. G. COOLEY, Appellee.

Journal Entry Denying Rehearing.

Now comes on for decision the petition for a rehearing of this cause; and thereupon it is ordered that said petition be denied.

59½ And afterwards, and on the 8th day of July, 1916, there was filed in the office of the Clerk of the Supreme Court of the State of Kansas, the courts written opinion, together with a syllabus thereto, denying a rehearing, which syllabus and opinion, are in the words and figures as follows to-wit:

60 No. 19,945.

ABE DANCIGER et al., PARTNERS, etc., Appellants,
v.
D. G. COOLEY, Appellee.

Appeal from Shawnee County (Division No. 1).

Rehearing Denied.

Opinion Denying a Rehearing.

Syllabus by the Court.

MASON, *J.*:

In the absence of any interpretation by the United States supreme Court, the federal statute forbidding a common carrier or any other person to collect the purchase price of intoxicating liquor from the consignee, in connection with its transportation into one state from another, will be construed by this court as applying to an agent of a shipper who delivers the bill of lading upon payment of a draft for the price.

All the justices concurring.

A true copy.
Attest:

[Seal Supreme Court, State of Kansas.]

D. A. VALENTINE,
Clerk Supreme Court.

61 No. 19,945.

The opinion of the court was delivered by

MASON, *J.*:

In a petition for a rehearing it is argued that the decision is in conflict with one which had been rendered a few weeks earlier by the United States supreme court (Rosenberger v. Pacific Express Co., 241 U. S. 48). That case has been examined and is not regarded as fatal to the validity of the Kansas statute relied upon in the original opinion (Gen. Stat. 1909, §4398).

The plaintiffs also strongly urge that the federal statute of 1909, which this court regarded as penalizing the transactions on which the action is founded, is not open to the construction given it, and ask a rehearing in order that the question may be further argued. The motion itself includes a full and able presentation of the matter, setting out in detail the various decisions and administrative rulings relating to it, and a further hearing is not thought to be necessary. The section under consideration reads:

"Any railroad company, express company, or other common carrier, or any other person who, in connection with the transportation of any spirituous, vinous, malted, fermented, or other intoxicating liquor of any kind, from one State * * * into any other State, * * * shall collect the purchase price or any part thereof, before, on, or after delivery, from the consignee, or from any other person, or shall in any manner act as the agent of the buyer or seller of any such liquor, for the purpose of buying or selling or completing the sale thereof, saving only in the actual transportation and delivery of the same, shall be fined not more than five thousand dollars." (Part 1, 35 U. S. Stat. at Large, ch. 321, §239, p. 1136, 4 U. S. Comp. Stat. 1913, §10,409.)

The federal court of appeals for this circuit has held that notwithstanding the act in terms relates to the conduct of common carriers "or any other person," it should be interpreted, by applying the principle relating to the use of associated words, as excluding "all persons who are not members of the general class of carriers." (First Nat. Bank v. United States, 206 Fed. 374, 378.) The
62 decision there appealed from had been to the contrary, and one of the three judges who heard the case on review dissented. The opinion of the reviewing court, the dissenting opinion, and the opinion of the trial court (United States v. First Nat. Bank, 190 Fed. 336) present the arguments on each side of the question so fully that no detailed discussion seems necessary. The general purpose of the act was of course to prevent evasions of local laws for the regulation or suppression of the liquor traffic. The history of its enactment, as stated by Judges Amidon and Trieber, shows that the method of doing business employed in the present case was in fact one of the very abuses against which it was directed. The majority opinion is avowedly based upon a strict construction adopted because of the penal character of the statute, and because of the practical consequences of its literal enforcement. One reason

it assigns for the conclusion reached is that as the mischief at which the statute was leveled existed only in the states wherein the sale of liquor was prohibited, it is "incredible" that congress by the language used intended "to strike down this method of collection for the sale of liquors transported in interstate commerce in all the states in the large majority of which the manufacture and sale of intoxicating liquors were not prohibited." (First Nat. Bank v. United States, 206 Fed. 374, 378.) This quantitative argument takes no account of the extensive districts in which sales of liquor are forbidden under local option laws, or of the possibility that congress may have anticipated the increase of state wide prohibition that has actually taken place, so that at the present time the "dry" territory of the country exceeds in area the "wet" in the proportion of at least four to one. (See Map, 112 Outlook (Jan. 19, 1916) 120.) The preponderance of expressed opinion against giving effect to the letter of the statute appears to be due to an estimate of the importance of preserving the right to sell intoxicating liquors by means of drafts attached to bills of lading, in which this court does not share. In our judgment, the act, notwithstanding its penal character, should be reasonably construed with a view to
63 carry out the purpose for which it was enacted. Unless the federal supreme court gives it a different interpretation we shall adhere to that adopted in the original opinion.

The petition for a rehearing is denied.

All the justices concurring.

A true copy.
Attest:

[Seal Supreme Court, State of Kansas.]

D. A. VALENTINE,
Clerk Supreme Court.

64 SUPREME COURT STATE OF KANSAS, *ss*:

I, D. A. Valentine, clerk of the Supreme Court of the State of Kansas, do hereby certify that the above and foregoing is a full true and complete transcript of the record and proceedings in the case of Abe Danciger et al., etc., Appellants, vs. D. G. Cooley, Appellee, and also of the opinions of the court rendered therein as the same now appear of record and remain on file in my office.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at my office in the city of Topeka, Kansas, this 29th day of August, A. D. 1916.

[Seal Supreme Court, State of Kansas.]

D. A. VALENTINE,
Clerk of the Supreme Court of the State of Kansas.

65 In the Supreme Court of the United States.

ABE DANCIGER, DAN DANCIGER, JOE DANCIGER, M. O. DANCIGER, JACK DANCIGER, Plaintiffs in Error,

vs.

D. G. COOLEY, Defendant in Error.

Præcipe.

To the Clerk of the Supreme Court of Kansas:

You are hereby requested and directed to make a transcript of the record to be filed in the Supreme Court of the United States pursuant to a writ of error allowed in the above entitled cause, being case No. 19945 in the Supreme Court of Kansas, and to incorporate (by original or by authenticated copy as may be proper) into the transcript of record the following pages and exhibits, to-wit:

1. Insert the petition for a writ of error and order of Honorable W. A. Johnston, Chief Justice of the Supreme Court of Kansas, allowing the said writ of error; assignment of errors and prayer for reversal; the writ of error and bond; citation and proof of service thereof.

2. Insert the following portions of the printed abstract of record filed in the Supreme Court of Kansas, to-wit: All of pages 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, the first and second lines of page 24, and instructions numbered "3," "4," "5" and down to the word "Instructions," (page 25) of pages 24 and 25. Page 25 as follows "Instructions." The Court: Gentlemen of the Jury:" * * * Here insert the second paragraph of page 26. Page 29, beginning "Thereafter the jury retired," etc. Page 30, page 31, page 32, and page 33.

3. Insert the following portions of the counter abstract of appellees: Pages 1, 2, 3, and 4. Insert the notice, and proof service, of appeal.

4. Insert the opinion of the Supreme Court of Kansas.

5. Insert the appellant's Motion for Rehearing, Brief and Argument, down to "Brief and Argument," being the first four pages and sheets thereof. Then insert this recital. "The Rosenberger case is now reported in the Supreme Court Reporter."

6. Insert the opinion of the Supreme Court of Kansas on the motion for rehearing.

7. Insert the final judgment of the Supreme Court of Kansas affirming this case and affirming the judgment and ruling below.

8. Insert this præcipe, a proof of service of same.

9. Add your certificate.

66 10. Upon completion thereof the Clerk of the Supreme Court of Kansas shall file the same with the clerk of Supreme Court of the United States, and within thirty days from August 18th, 1916.

J. P. McLAUGHLIN,
HARRY L. JACOBS,
Attorneys for Plaintiffs in Error.

Due service of the above and foregoing præcipe is hereby acknowledged and accepted this — day of August, 1916, for and on behalf of the said D. G. Cooley, defendant in error in the above entitled cause.

——— ———,
Attorney for Defendant in Error.

STATE OF MISSOURI,
County of Jackson, ss:

On this 18th day of August, in the year of our Lord, one thousand nine hundred & sixteen, personally appeared Harry L. Jacobs, before me the subscriber, & makes oath that he delivered a true copy of the within præcipe to D. G. Cooley, defendant in error.

(Signed) HARRY L. JACOBS.

Sworn to & subscribed the 18th day of August, A. D. 1916.

[Seal H. A. Kresky, Jackson Co., Mo., Notary Public.]

H. A. KRESKY,
Notary Public.

My com. expires June 8th, 1918.

67 [Endorsed:] 19945. Abe Danciger et al., Appellants, vs. D. G. Cooley, Appellee. Præcipe for Transcript. Filed Aug. 19, 1916. D. A. Valentine, Clerk Supreme Court.

68 Here follows the original petition for a writ of error, the writ of error and allowance thereof, the assignments of errors, the Citation with the service thereof, and a copy of the Bond for appeal.

69 In the Supreme Court of the State of Kansas, — Term.

No. 19945.

ABE DANCIGER, DAN DANCIGER, JOE DANCIGER, M. O. DANCIGER, and Jack Danciger, Doing Business as a Copartnership under the Firm-name and Style of Danciger Brothers, Appellants,

vs.

D. G. COOLEY, Appellee,

Petition for Writ or Error.

To the Honorable W. A. Johnston, Chief Justice of the Supreme Court of Kansas:

Petitioners, appellants herein, respectfully move and pray that a writ of error, sending the record and proceedings, with all things concerning same, and the judgment rendered herein, in this cause, to the Supreme Court of the United States, be granted, and that an order fixing bond and the amount thereof, be made, and for such

other orders as may be meet and proper in the premises. An assignment of errors and motion for reversal are filed and presented herewith.

ABE DANCIGER,
DAN DANCIGER,
M. O. DANCIGER AND
JACK DANCIGER,
Doing Business as Danciger Brothers,
—— ——, *Petitioners,*
By ABE DANCIGER,
A Member of the Firm.

STATE OF MISSOURI,
County of Jackson, ss:

Abe Danciger of lawful age being first duly sworn on his oath states that he is one of the foregoing petitioners and makes this affidavit for himself and co-petitioners; that the foregoing petition, and the assignment of errors, and prayer for reversal, filed and presented herewith, are made in good faith, and that the matters and facts and allegations therein are true to the best of affiant's knowledge and belief.

ABE DANCIGER,

Subscribed and sworn to before me this 14 day of August 1916.

[Seal H. A. Kresky, Notary Public, Jackson Co., Mo.]

H. A. KRESKY,
Notary Public.

My Commission expires June 8th, 1918.

70 [Endorsed:] 19945. Abe Danciger et al. vs. D. G. Cooley. Petition for Writ of Error. Filed Aug. 15, 1916. D. A. Valentine, Clerk Supreme Court.

71 In the Supreme Court of the State of Kansas — Term.

No. 19945.

ABE DANCIGER, DAN DANCIGER, JOE DANCIGER, M. O. DANCIGER, and Jack Danciger, Doing Business as a Copartnership under the Firm-name and Style of Danciger Brothers, Apppellants,
vs.
D. G. COOLEY, Appellee.

Order Allowing Writ and Fixing Bond.

Now on the 15th day of August, 1906, appellants present their petition for writ of error with assignment of errors and prayer for reversal, and the Presiding Justice of the Supreme Court of Kansas, having read, and considered same, allows said writ of error, in

accordance with the prayer thereof, to the Supreme Court of the United States and orders that bond be given in the amount of $1000.

W. A. JOHNSTON,
Chief Justice of the Supreme Court of Kansas.

72 [Endorsed:] 19945. Abe Danciger et al. vs. D. G. Cooley. Order Allowing Writ of Error and Fixing Bond. Filed Aug. 15, 1916. D. A. Valentine, Clerk Supreme Court.

73 In the Supreme Court of the State of Kansas, — Term.

No. 19945.

ABE DANCIGER, DAN DANCIGER, JOE DANCIGER, M. O. DANCIGER, and Jack Danciger, Doing Business as a Copartnership under the Firm-name and Style of Danciger Brothers, Appellants,

vs.

D. G. COOLEY, Appellee.

Assignment of Errors and Prayer for Reversal.

Now come appellants in this cause and represent that heretofore the District Court of Shawnee County, Kansas sustained a demurrer to two counts of their petition and the evidence thereunder in an action wherein they were plaintiffs and appellee, the defendant. That the Supreme Court of Kansas, being the highest court in said State in which a decision in the suit could be had, on appeal, after a consideration of said suit and ruling, on its merits, rendered judgement affirming said ruling and affirming a judgment rendered for defendant after verdict by a jury on the other two counts of plaintiff's petition, which judgment of the Supreme Court under the laws of Kansas, was a final decision of said suit in favor of appellee against appellant, on the merits.

Appellant's file herewith and present their petition for a writ of error and say that there are errors in the record and proceedings and judgment, in the above entitled cause, and for the purpose of having same reviewed in the United States Supreme Court, make the following assignment of errors.

1. The Supreme Court of Kansas erred in holding and deciding Section 4398, General Statutes of Kansas, 1909 was valid in so far as it might make illegal or might affect or might prevent interstate shipments of intoxicants shipped to the order of the shipper, from Missouri into Kansas, the drafts covering the purchase price of the such shipments, being drawn on the bona fide purchasers, the bills of lading covering same being attached to the drafts, the bills of lading being endorsed, and being sent to the State of Kansas, the bills of lading to be delivered to the bona fide purchasers on pay-

74 ment of the drafts.

2. The validity of said section was denied by plaintiffs and drawn in question, on the ground of its being repugant to and in

contravention of the Commerce clause of the Constitution of the United States (Sec. 8, Art. 1) and the clause of the Constitution of the United States prohibiting passage by the States of any law impairing the obligation of contracts (Sec. 10. Art. 1). The Supreme Court of Kansas erred in holding same valid, and in not holding same unconstitutional, for said reasons.

3. The Supreme Court of Kansas erred in holding and deciding that Sec. 239 of the Penal Code of the United States was applicable to the collecting of the purchase price of interstate shipments of intoxicants, by a person not connected with or of the general class of carriers, and to the conduct of the parties to this cause; and in refusing to follow a final decision of the United States Circuit Court of Appeals for the 8th Circuit, construing said Statute and in refusing to follow the construction placed on said Statute by the Federal officers whose duty it is to enforce same, and the construction of the Attorney General of the United States.

4. The Supreme Court of Kansas erred in holding and deciding that the trial court properly sustained a demurrer to the first and fourth counts of the Plaintiffs' cause of action.

5. The Supreme Court of Kansas erred in holding and deciding that the conduct of the parties in the instant case, although interstate commerce, could be controlled or prohibited so far as the methods or means of effecting same was concerned.

6. The Supreme Court of Kansas erred in holding and deciding that Section 4398, General Statutes of Kansas, 1909, was valid as to interstate shipments and commerce, because it prevented abuses thereof, for the reason that same applies to all cases of interstate shipments made by the shippers order method, whether abuse be effected or not.

7. The Supreme Court of Kansas erred in affirming the judgment of the trial court and the ruling sustaining the demurrer and
75 in not reversing said ruling and judgment and remanding said cause for trial on the first and fourth counts of Plaintiffs petition.

For which errors Plaintiffs pray that the said judgment and decision of the Supreme Court of Kansas be reversed and the cause be remanded for further proceedings in conformity with the correction of the errors assigned and with the order of reversal, and for costs.

ABE DANCIGER,
DAN DANCIGER,
JOE DANCIGER,
M. O. DANCIGER, AND
JACK DANCIGER,
Doing Business as Danciger Brothers, Appellants,
By ABE DANCIGER.

J. P. McLAUGHLIN,
HARRY L. JACOBS,
Attorneys for Appellants.

76 [Endorsed:] 19945. Abe Danciger et al. vs. D. G. Cooley. Assignment of Error. Prayer for Reversal. Filed Aug. 15, 1916. D. A. Valentine, Clerk Supreme Court.

77 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judges of the Supreme Court of Kansas, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court of the State of Kansas, before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Abe Danciger, Dan Danciger, Joe Danciger, M. O. Danciger, and Jack Danciger vs. D. G. Cooley, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein any title, right, privilege, or im-
78 munity was claimed under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States, and the decision was against the title, right, privilege, or immunity especially set up or claimed under such Constitution, treaty, statute, commission, or authority; a manifest error hath happened to the great damage of the said Abe Danciger, Dan Danciger, Joe Danciger, M. O. Danciger, and Jack Danciger, doing business as Danciger Brothers, as by their complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the Seventeenth day of August, in the year of our Lord one thousand nine hundred and sixteen.

[Seal of District Court U. S., District of Kansas, 1861.]

MORTON ALBOUGH,
Clerk of the District Court of the United States for the District of Kansas.

Allowed by—
W. A. JOHNSTON,
Chief Justice of the Supreme Court of Kansas.

79 [Endorsed:] 19945. Supreme Court of the United States, 191–. Abe Danciger et al. vs. D. G. Cooley. Writ of Error. Filed Aug. 19, 1916. D. A. Valentine, Clerk Supreme Court.

80 UNITED STATES OF AMERICA, *ss:*

To D. G. Cooley, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the Supreme Court of Kansas, wherein Abe Danciger, Dan Danciger, Joe Danciger, M. O. Danciger, and Jack Danciger, a co-partnership doing business under the firm name of Danciger Brothers, are plaintiffs in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable W. A. Johnston, *Associate* Chief Justice of the Supreme Court of Kansas, this eighteenth day of August, in the year of our Lord one thousand nine hundred and sixteen.

W. A. JOHNSTON,
Chief Justice of the Supreme Court of Kansas.

I, attorney of record for the defendant in error in the above entitled cause, hereby acknowledge due service of the above citation, and enter an appearance in the Supreme Court of the United States.

——— ———,
Attorney for D. G. Cooley.

81 STATE OF MISSOURI,
County of Jackson, ss:

On this 18th day of August, in the year of our Lord one thousand nine hundred and sixteen, personally appeared Harry L. Jacobs before me, the subscriber, and makes oath that he delivered a true copy of the within citation to D. G. Cooley, defendant in error.

(Signed) HARRY L. JACOBS.

Sworn to and subscribed the 18th day of August, A. D. 1916.

[Seal H. A. Kresky, Notary Public, Jackson Co., Mo.]

H. A. KRESKY,
Notary Public.

My Com. expires June 8th, 1918.

[Endorsed:] Citation. 19945. Abe Danciger et al., Appellants, vs. D. G. Cooley, Appellee. Citation. Filed Aug. 19, 1916. D. A. Valentine, Clerk Supreme Court.

82 Know all men by these presents, That we, Abe Danciger, Dan Danciger, Joe Danciger, M. O. Danciger, and Jack Danciger, as principals, and National Surety Company, and Harry L. Jacobs, as sureties, are held and firmly bound unto D. G. Cooley in the full and just sum of One Thousand ($1,000.00) dollars, to be paid to the said D. G. Cooley, his certain attorney, executors, administrators, or assigns: to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals and dated this 16th day of August, in the year of our Lord one thousand nine hundred and sixteen.

Whereas, lately at a Supreme Court of Kansas in a suit depending in said Court, between above named principals as appellants, and D. G. Cooley, as appellee, a decision and judgment was rendered against the said appellants and for the said appellee affirming a judgment and ruling which had been appealed from and the said appellants above named having obtained a writ of error and filed a copy thereof in the Clerk's Office of the said Court to reverse the judgment and decision in the aforesaid suit, and a citation directed to the said D. G. Cooley citing and admonishing him to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date thereof.

Now, the condition of the above obligation is such, That if the said Abe Danciger, Dan Danciger, Joe Danciger, M. O. Danciger, and Jack Danciger shall prosecute said writ of error to effect, and answer all damages and costs if they fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

ABE DANCIGER.
JOE DANCIGER.
DAN DANCIGER. [SEAL.]
M. O. DANCIGER.
JACK DANCIGER.
NATIONAL SURETY COMPANY. [SEAL.]
By P. O. DRAPER, *Attorney in Fact.* [SEAL.]
HARRY L. JACOBS.

Sealed and delivered in presence of—

——— ———.
——— ———.

Approved by—

W. A. JOHNSTON,
Chief Justice of the Supreme Court of Kansas.

83 [Endorsed:] 19945. Abe Danciger et al., Appellants, vs. D. G. Cooley, Appellee. Bond for Appeal. Filed Aug. 19, 1916. D. A. Valentine, Clerk Supreme Court.

84 SUPREME COURT, STATE OF KANSAS, *ss:*

I, D. A. Valentine, clerk of the said court do hereby certify that there was lodged with me as clerk, on August 19th, 1916, in the matter of Abe Danciger et al. etc. Appellants vs. D. G. Cooley, Appellee.

1. The original Bond of which a copy is herein set forth.

2. Two copies of the writ of error as herein set forth—one for the appellee and one to file in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at my office in the City of Topeka, Kansas, this 29th day of August, A. D. 1916.

[Seal Supreme Court, State of Kansas.]

D. A. VALENTINE,
Clerk of the Supreme Court of the State of Kansas.

85 UNITED STATES OF AMERICA,
Supreme Court of Kansas, ss:

In obedience to the commands of the within writ, I herewith transmit to the Supreme Court of the United States of America a duly certified transcript of the complete records and proceedings in the within entitled case, together with all things concerning the same.

In witness whereof, I have hereunto subscribed my name and affixed the seal of the said Supreme Court of Kansas, in the city of Topeka this 29th day of August, A. D. 1916.

[Seal Supreme Court, State of Kansas.]

D. A. VALENTINE,
Clerk of the Supreme Court of the State of Kansas.

Endorsed on cover: File No. 25,494. Kansas Supreme Court. Term No. 664. Abe Danciger et al., doing business as Danciger Brothers, plaintiff in error, vs. D. G. Cooley. Filed September 18, 1916. File No. 25,494.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1918.

ABE DANCIGER, DAN DANCIGER, JOE DANCIGER, M. O. DANCIGER, AND JACK DANCIGER, DOING BUSINESS AS A CO-PARTNERSHIP UNDER THE FIRM NAME AND STYLE OF DANCIGER BROTHERS, PLAINTIFFS IN ERROR,

VS.

D. G. COOLEY, DEFENDANT IN ERROR.

WRIT OF ERROR TO THE UNITED STATES SUPREME COURT FROM SUPREME COURT OF THE STATE OF KANSAS.

STATEMENT.

Plaintiffs in error, whom, for brevity, we shall hereinafter refer to as plaintiffs, sued defendant in error, whom we shall hereinafter refer to as defendant, in the District Court of the State of Kansas, Shawnee County. Plaintiffs' petition contained four counts—counts two and three of plaintiffs' petition being for liquor sold to defendant (Record, pp. 6 and 7); counts one and four thereof being for collections made by defendant for the plaintiffs and the Royal Brewing Co., from

purchasers of liquor, the Brewing Company having, prior to institution of suit, assigned its account to plaintiffs (Record, pp. 5, 6, 8 and 9).

For his defense to counts numbered "2" and "3," defendant pleaded payment, which issue was submitted to a jury, and which was found in defendant's favor. This finding was, upon appeal, affirmed by the Supreme Court of Kansas, and is not before this court in plaintiffs' writ.

The circumstances out of which plaintiffs' counts numbers "1" and "4" arose, are as follows:

The plaintiffs are wholesale liquor dealers, engaged in business at Kansas City, Missouri. The Royal Brewing Company is engaged in the manufacture and sale of beer at Weston, Missouri, and Kansas City, Missouri.

The plaintiffs and Brewing Company received a number of written orders, through the United States mails, for liquor from customers in Topeka, Kansas. These orders were received at Kansas City, Missouri, where the sale of liquor was legal, and the liquor specified in said orders was delivered to carrier at Kansas City, Missouri. In each instance, the liquor was shipped by freight to plaintiffs' own order, the bill of lading being mailed to the defendant, with instructions to deliver it to the person who sent the order, upon payment of an accompanying draft for the purchase price.

The defendant agreed to collect these drafts from the customers, upon payment to him by the plaintiffs of a commission, based upon the amounts collected, and which averaged a little over 25 per cent of the collection.

Defendant collected certain drafts and refused to pay to the plaintiffs the amounts so collected by him, less his com-

missions. This constituted the causes of action stated in plaintiffs' counts "1" and "4."

Upon these counts, the court sustained a demurrer to the plaintiffs' evidence, and rendered judgment for the defendant, upon the theory that the plaintiffs and the defendant were engaged in a violation of the laws of the State of Kansas, relating to the liquor traffic, and more particularly Section 4398, General Statutes of Kansas, 1909; and that the collections made by the defendant were the proceeds of such violation, and that the courts will not lend their aid to the apportionment of the profits of the illegal transactions.

The District Court refused to instruct the jury, as requested by the plaintiffs, which instructions were based upon the laws of the United States, and decisions of this court (Record, p. 19).

Thereupon, from the judgment of the District Court, the plaintiffs appealed to the Supreme Court of the State of Kansas, which court affirmed the ruling of the District Court, holding that as to counts "1" and "4," Section 4398, General Statutes of Kansas, 1909, governed and controlled, and refusing to follow the Commerce Clause of the Federal Constitution, and the laws of the United States, and the decisions of this court (Record, pp. 27 to 31).

Thereupon, plaintiffs filed their motion for rehearing (Record, pp. 31 to 34), in which motion the attention of the Supreme Court of Kansas was directly called to the decision of this court in the case of

Rosenberger v. *Pacific Express Co.* (241 U. S. 48), and other decisions of this court, but which motion was by the said Supreme Court of Kansas, in its written opinion (Record, pp. 35 and 36), overruled.

Thereupon, plaintiffs filed in the said Supreme Court of the State of Kansas, their petition for a writ of error to this court (Record, pp. 38 and 39), filing therewith their assignments of errors, and prayer for reversal (Record, pp. 40 and 41), which petition for writ of error was by Hon. W. A. Johnston, Chief Justice of the Supreme Court of the State of Kansas, duly allowed (Record, pp. 39 and 40); for the alleged errors assigned, and the above cause, by reason thereof, became duly lodged in this court, under writ issued by Hon. Edward D. White, Chief Justice of this court (Record, p. 42).

A citation was thereupon directed to the defendant (Record p. 43), and bond, in accordance with the order of the Supreme Court of Kansas, duly filed by the plaintiffs, and approved by the court (Record, p. 44).

The correctness of the ruling of the District Court of Kansas, sustaining the demurrer to plaintiffs' evidence, presents the serious question in this case, plaintiffs' contending that under the Commerce Clause of the Federal Constitution, the laws of the United States and decisions of this court, applied to the facts and circumstances out of which instant litigation arises, the shipments made by plaintiffs were not illegal; that the collection of the purchase price for the liquor in evidence was enforcible against the purchasers, and hence also against the defendant. That the decision of the Supreme Court of Kansas was in error, in holding that Section 4398, General Statutes of Kansas, 1909, governed and controlled, and in ruling adversely to plaintiffs, on these propositions, and was repugnant to, and in conflict with, the Federal Constitution, the laws of the United States, and the decisions and opinions of this court.

ASSIGNMENTS OF ERROR.

1. The Supreme Court of Kansas erred in holding and deciding Section 4398, General Statutes of Kansas, 1909, was valid, insofar as it might make illegal or might affect or might prevent interstate shipments of intoxicants, shipped to the order of the shipper, from Missouri into Kansas, the drafts covering the purchase price of such shipments being drawn on the *bona fide* purchasers, the bills of lading covering same being attached to the drafts, the bills of lading being endorsed and being sent to the State of Kansas, the bills of lading to be delivered to the *bona fide* purchasers on payment of the drafts.

2. The validity of said section was denied by plaintiffs and drawn in question, on the ground of its being repugnant to and in contravention of the Commerce Clause of the Constitution of the United States (Sec. 8, Art. 1), and the clause of the Constitution of the United States prohibiting passage by the states of any law impairing the obligation of contracts (Sec. 10, Art. 1). The Supreme Court of Kansas erred in holding same valid, and in not holding same unconstitutional, for said reasons.

3. The Supreme Court of Kansas erred in holding and deciding that Sec. 239 of the Penal Code of the United States was applicable to the collecting of the purchase price of interstate shipments of intoxicants, by a person not connected with or of the general class of carriers, and to the conduct of the parties to this cause; and in refusing to follow a final decision of the United States Circuit Court of Appeals for the Eighth

Circuit, construing said statute, and in refusing to follow the construction placed on said statute by the Federal officers, whose duty it is to enforce same, and the construction of the Attorney General of the United States.

4. The Supreme Court of Kansas erred in holding and deciding that the trial court properly sustained a demurrer to the first and fourth counts of the plaintiffs' cause of action.

5. The Supreme Court of Kansas erred in holding and deciding that the conduct of the parties in the instant case, although interstate commerce, could be controlled or prohibited so far as the methods or means of effecting same was concerned.

6. The Supreme Court of Kansas erred in holding and deciding that Section 4398, General Statutes of Kansas, 1909, was valid as to interstate shipments and commerce, because it prevented abuses thereof, for the reason that same applies to all cases of interstate shipments made by the shippers' order method, whether abuse be effected or not.

7. The Supreme Court of Kansas erred in affirming the judgment of the trial court, and the ruling sustaining the demurrer, and in not reversing said ruling and judgment and remanding said cause for trial on the first and fourth counts of plaintiffs' petition.

POINTS AND AUTHORITIES.

I.

Shippers' Order Shipments Are Legal.

Norfolk & Western Railway Co. v. *Simms* (191 U. S. 441, l. c. 447).

American Express Co. v. *Iowa* (196 U. S. 133, l. c. 143).

II.

Section 239, Penal Code of the United States, refers only to railroad carriers and not employees. None of its provisions covers the conduct of the parties in the instant case. The opinion of the Supreme Court of Kansas, holding that said Section 239 applied, is in conflict with, and repugnant to the decisions of the Federal Courts.

First National Bank v. *U. S.* (206 Fed. 374, l. c. 378).

29 Opinions, Attorney General, 58, l. c. 62.

Danciger et al. v. *Stone* (188 Fed. 510).

U. S. Express Co. v. *Friedman* (191 Fed. 673).

United States v. 87 *Barrels of Wine* (180 Fed. 215, l. c. 216).

III.

The decision of the Supreme Court of Kansas is in conflict with and repugnant to the commerce clause of the Constitution of the United States, and the law and doctrines declared and pronounced by this court in the case of Rosenberger v. Pacific Express Company (241 U. S. 48), and other recent decisions of this court.

Western Union Tel. Co. v. *Kansas* (216 U. S. 1, l. c. 27).

Sioux Remedy Company v. *Cope* (235 U. S. 197, l. c. 203).

Southern Operating Co. v. *Hays* (236 U. S. 188).

Norfolk & Western Railway Co. v. *Simms* (191 U. S. 441, l. c. 447).

Kirmeyer v. *Kansas* (236 U. S. 568, l. c. 572).

American Express Co. v. *Iowa* (196 U. S. l. c. 144).

Rosenberger v. *Pacific Express Co.* (241 U. S. 48).

Clark Distilling Co. v. *Western Maryland Ry. Co.* (242 U. S. 311).

Adams Express Co. v. *Kentucky* (236 U. S. 129).

IV.

Assuming, arguendo, that the Kansas Supreme Court's logic as to this case, and this statute, not being protected by the commerce clause, because of the Wilson law, is correct, yet, as Congress has already entered the field, such legislation is exclusive, and Section 4399, General Laws of Kansas, 1909, conflicting therewith, is invalid.

Palmer v. *Southern Express Co.* (165 S. W. 236, l. c. 243).

Blunk v. *Waugh* (32 Okla. l. c. 625).

McCord v. *State* (2 Okla. Crim. Rep. 214).

BRIEF AND ARGUMENT.

I.

Shippers' Order Shipments Are Legal.

(a.)

In the consideration of this case, it must be borne in mind that the Webb-Kenyon law was not passed until 1913, and has no application to instant case, and that the Wilson law, [Act of Congress Aug. 8, 1990c728, 26 St. 313 (Comp. St. 1916, Sec. 8738)] is the only Federal law applicable here.

The orders were received and accepted in Missouri, hence the contract of sale in each instance is a Missouri contract. By requiring surrender of the original bill of lading, consignors reserved to themselves the right of possession, not the title, in the nature of a lien for the purchase price.

The place of the meeting of minds—Missouri—in instant matter, is the gist of and point of sale, and it is really immaterial whether vendor retains a technical property in the goods, a lien for purchase price, a naked right of possession, or any other manner of security of payment.

This court has stated the whole proposition as follows:

> "A sale really consists of two separate and distinct elements: First, *a contract of sale, which is completed when the offer is made and accepted;* and, second, a delivery of the property which may precede, be accompanied by, or follow the payment of the price, as may be agreed upon between the parties. *The substance of the sale* is the *agreement to sell and its acceptance.* That possession shall be retained until payment of the price may or may not have been a part of the original bar-

gain, *but in substance it is a mere method of collection,*" etc.

Norfolk & W. Ry. Co. v. *Sims* (191 U. S. 441, l. c. 447), approved with reference to liquors in *American Express Co.* v. *Iowa* (196 U. S. 133, l. c. 143, 1904).

II.

Section 239, Penal Code of the United States, refers only to railroad carriers, and their employees. None of its provisions covers the conduct of the parties in the instant case. The opinion of the Supreme Court of Kansas, holding that said Section 239 applied is in conflict with and repugnant to the decisions of the Federal Courts.

The United States Circuit Court of Appeals for the Eighth Circuit, in a final decision, has construed Section 239 directly opposite to the instant construction. A decision by Judge Amidon of the District Court, holding just as this court held, was reversed. In reversing same, the court said:

> "To our minds the natural and manifest meaning of the declaration in this law that 'any railroad company, express company or other common carrier, or any other person, who, in connection with the transportation,' etc., shall collect the purchase price or act as the agent of the buyer, or seller, shall be fined, excludes banks, ordinary collectors and all persons who are not members of the general class of carriers."
>
> *First National Bank* v. *U. S.* (206 Fed. 374, l. c. 378).

Attorney-General of the United States, Wickersham, in an opinion discussing in detail the Shippers' Order business as done by appellants, and even referring to one of their bills

of lading, concurred in a decision of the Secretary of the Treasury, and said:

> "The Act does not apply to banks collecting drafts with bill of lading attached, where the shipment is made to a real consignee upon an order sent by him and filled by shipment from the dealer's place of business. The collection of a draft for the purchase price of a commodity in that manner is the usual and ordinary method of carrying on business, and is not connected with the transportation of the property within the meaning of the statute under consideration."
>
> 29 Opinions, Attorney-General, 58, l. c. 62.

In a case brought by plaintiffs in error herein, United States District Judge Campbell flatly rejected the construction made by the Kansas Supreme Court of the statute.

Danciger et al. v. *Stone* (188 Fed. 510).

The various courts considering the statute construe it in accordance with the construction of the Attorney-General and the Circuit Court of Appeals.

U. S Express Co. v. *Friedman* (191 Fed. 673).
U. S. v. 87 *Barrels of Wine* (180 Fed. 215, l. c. 216).

Thus, we find the Attorney-General of the United States, the Circuit Court of Appeals for this Circuit, the Secretary of the Treasury, and the various Federal courts—in short, those to whom would fall the duty and burden of enforcing and construing the Act—unanimous in a construction of the statute conflicting with the opinion of the Supreme Court of Kansas.

III.

The decision of the Supreme Court of Kansas is in conflict with and repugnant to the commerce clause of the Constitution of the United States, and the law and doctrines declared and pronounced by this court in the case of Rosenberger v. Pacific Express Company (241 U. S. 48), and other recent decisions of this court.

(a.)

The decision of the Kansas Supreme Court is based on two propositions. The court held that a sale in Missouri, a shipment from Missouri to Kansas, and a delivery to a resident purchaser in Kansas, only upon payment of the purchase price, constituted an interstate commerce transaction, and that a state law substantially interfering with same would be void. But the court held, first, that "it does not follow that the methods adopted for the execution of such an arrangement are wholly beyond the reach of state legislation." Second, that Section 4399, Statutes of Kansas, could be upheld on the ground that it prevented an evasion of, or fraud on, the local prohibition laws. The fallacy of these two propositions, which are interdependent, we shall endeavor to point out in the order stated.

(b.)

The Supreme Court of Kansas held that the gist, or substance of what was done in this case, was fair interstate commerce. The court said:

> "The State could not effectively forbid the making and carrying out of an agreement by the plaintiffs to cause liquor to be transported from Kansas City, Missouri, to Topeka, and there delivered to him upon payment of the purchase price" (Record, p. 29).

But the court held the method, or execution of *such* an agreement might be controlled. In other words, although A has a right to sell beer to B, and to ship it to Topeka, Kansas, to be delivered to B, and although A has a right to reserve the possession, title or a lien for the purchase price, and although he may prevent the delivery, except upon payment of the purchase price, yet, because to more effectually carry out the foregoing rights, he adopts the form of bill of lading recommended for uniform use by the Interstate Commerce Commission, and in universal use as to all commodities, and ships not to himself, as this court stated it, BUT TO HIS ORDER, *which can mean no more or no less than to the party to whom he ordered delivery—the purchaser;* yet a state law prohibiting such a method (even though it is the means of carrying out the lawful interstate commerce transaction and agreement), is held by the court to be lawful. The position seems to us to be anomalous.

The question in this case is simply this. If, looking through the methods used and the devices employed, if looking at the substance and the gist of the transaction, we find a Missouri sale and interstate shipment, a reservation of title by shipment to the order of shipper, a bill of lading, or order, to be delivered to the *bona fide* purchaser upon payment of the purchase price, such an arrangement being resorted to simply as a "mere collection device"—in short, a lawful interstate commerce transaction—then, have we the right to claim the protection of the Commerce Clause of the Federal Constitution, because the substance, subject and object of our transaction is within it, or must we stand or fall as judged by the *methods* we have used?

Although we have a right to do in substance just what we did, that is, ship liquor, interstate, in good faith on a *bona fide* order, to be actually received only by the *bona fide* purchaser, on payment of a draft drawn only on him, yet can we be confined by state legislation to using any certain method therefor? Can the State prescribe any method, or any part of any method, we cannot use to that end?

(c.)

We contend that the adjudications of this court have positively settled the proposition that courts must look straight through the methods employed, to the substance of the transaction, and if there is found in substance an interstate transaction, then the forms, devices and methods become an integral part thereof, and are in no way subject to State regulation or control.

> "This court has repeatedly adjudged that in all such matters the judiciary will not regard mere forms, but will look through forms to the substance of things."
>
> *Western Union Tel. Co.* v. *Kansas* (216 U. S. 1, l. c. 27).
>
> *Sioux Remedy Co.* v. *Cope* (235 U. S. 197, l. c. 203).

> "It is not open to controversy that substance and not form controls in determining whether a particular transaction is one of interstate commerce, and hence that the mere *method of delivery* is a negligible circumstance, if in substantial effect, the transaction under the facts of a given case is interstate commerce."
>
> *Southern Operating Co.* v. *Hays* (236 U. S. 188).

In *Norfolk Western Railway Co.* v. *Sims* (191 U. S. 441, l. c. 447), it is held in no uncertain language that a mere

collection device or method, in connection with a shipment from one state to another, cannot be affected by a state law, and such legislation would be an unjustifiable interference with interstate commerce.

In *Sioux Remedy Co.* v. *Cope* (235 U. S. 197, l. c. 202, 203), it was held:

> "On the first point it is enough to say that the right to demand and enforce payment for goods sold in interstate commerce, if not a part of such commerce, it is so directly connected with it and is so essential to its existence that the imposition of unreasonable conditions upon this right much necessarily operate as a restraint or burden upon interstate commerce."

In *Kirmeyer* v. *Kansas* (236 U. S. 568, l. c. 572) this court, reversing the decision of the Kansas Supreme Court holding, as in the instant case, that it was not precluded from "a fair inquiry into the *methods* and practices in order to determine whether transactions were legitimate interstate commerce," held:

> "That the traffic moved by horse-drawn wagons, from point near the State Line, instead of by railroad from a greater distance, does not change the applicable rule. Nor did the mere adoption of cumbersome and expensive methods render the business intrastate—that must be tested by the actual transactions."

And so in the instant case, the fact that plaintiffs in error secured the purchase price by what may be termed the more cumbersome method of shipping to the order of the shipper, instead of shipping straight, or C. O. D., cannot change the actual transaction. The fact that we used a horse-drawn wagon, instead of a train, there being a state law, in effect,

prohibiting the use of horse-drawn wagons, but not trains, can make no difference, and cannot deprive us of the protection of the Commerce Clause of our Federal Constitution. The actual transaction alone determines whether or not the Commerce Clause protects the transaction from any state legislation.

(d.)

Coming down to a consideration of the C. O. D. cases, indistinguishable in principle from the present case, we find this question conclusively decided in *American Express Co.* v. *Iowa* (196 U. S. 133), a case with which we contend the instant decision irreconcilably conflicts. That case holds that the freedom of interstate commerce protects the right of one citizen to sell in his state and the other person to receive in a different state, liquor. That it is immaterial that title might not pass until payment in the latter state. The court approved the case of *Caldwell* v. *North Carolina* (187 U. S. 622), which held that where one method of effecting the shipment would not have subjected the transaction to a state law, then the fact that a different method was used could in no way change the character of the commerce as interstate, and hence immune. The court held the real test to be, whether the transaction was valid as judged by the laws of the state where the contract was made.

This court flatly held that a state law, there considered, could not be upheld for the following reasons, every one of which is precisely in point here:

> "When it is considered that the necessary result of the ruling below was to hold that, whenever merchandise shipped from one state to another is not completely

delivered to the buyer at the point of shipment, so as to be at his risk from that moment, the movement of such merchandise is not interstate commerce, it becomes apparent that the principle, if sustained, would operate materially to cripple, if not destroy, that freedom of commerce between the states which it was the purpose of the Constitution to promote. If upheld, the doctrine would deprive the citizen of one state of his right to order merchandise from another state at the risk of the seller as to delivery. It would prevent the citizen of one state from shipping into another, unless he assumed the risk; it would subject contracts made by common carriers and valid by the laws of the state where made, to the laws of another state, and it would remove from the protection of the Interstate Commerce Clause all goods upon consignment upon any condition. BESIDES, IT WOULD ALSO RENDER THE COMMERCE CLAUSE OF THE CONSTITUTION INOPERATIVE AS TO ALL THAT VAST BODY OF TRANSACTIONS BY WHICH THE PRODUCTS OF THE COUNTRY MOVE IN THE CHANNEL OF INTERSTATE COMMERCE, BY MEANS OF BILLS OF LADING TO THE SHIPPER'S ORDER WITH DRAFTS FOR THE PURCHASE PRICE ATTACHED, AND MANY OTHER TRANSACTIONS ESSENTIAL TO THE FREEDOM OF COMMERCE, BY WHICH THE COMPLETE TITLE IS POSTPONED TO DELIVERY THEREOF."

Am. Ex. Co. v. *Iowa* (196 U. S. l. c. 144).

We do not see how the unequivocal declaration of the court in the above case, that such transactions and such methods are interstate commerce, and hence not subject to be hindered by state laws, can possibly be reconciled with the decision of the Supreme Court of Kansas. Indeed, no attempt is made in the opinion to do so.

The opinion in *American Express Company* v. *Iowa, supra*, has been approved by this court in the case of *Rosenberger* v. *Pacific Express Co.*, 241 U. S. 48, and in *Clark Distilling Company* v. *Western Maryland Ry. Co.*, 242 U. S. 311, and there is no longer any doubt pertaining to the law declared in the same. In the Rosenberger case, *supra*, l. c. 53, it was held:

> "But to state these general considerations is indeed superfluous since in one of the previous cases which we have cited (*Am. Ex. Co.* v. *Iowa*, 196 U. S. 133, 143, 144) substantially the identical contention which we have just disposed of was relied upon, and its unsoundness was expressly pointed out and the destructive consequences, which would arise from its adoption, stated."

If the shipping in interstate commerce, purchase price to be collected on delivery, is valid, but the method of so doing can be controlled by the states, as held by Supreme Court of Kansas, then why is it that states have no right to prohibit a carrier from a C. O. D. business? That is only a *method* of collecting the price. And the Kansas Supreme Court holds that the *method* is subject to control. Yet, it stands decided that the C. O. D. method is not subject to state legislation. On like principle, neither is the method in the instant case. They both secure the same end and they are both subject to the same abuse.

We feel that the Rosenberger, C. O. D., and Clark decisions, *supra*, should control this case. If one cannot collect the purchase price of liquor by the Shippers' Order method, then why can he collect it by the C. O. D. method? Where, as in Kansas, Section 4399, R. S. of Kansas, prevents Shippers' Order shipments, yet in another state the statute pro-

hibits C. O. D. shipments, this court has held the latter statute void. We contend, therefore, that by a parity of reasoning the same rule applies to the vast channel of commerce moving by means of Shippers' Order shipments. Indeed, any reasoning applying to the one can, and in all fairness should, be applied to the other. The purposes are the same, and the abuses they are subject to are the same.

The C. O. D. cases and the declarations of this court on the protection of Shippers' Order business by the Commerce Clause, we earnestly submit, are binding upon the Supreme Court of Kansas in the matter at bar, and the opinion of the lower court is in direct conflict with these decisions.

(e.)

The only other basis of the Kansas court's opinion is that it should be held that in the exercise of its police power, in order to "prevent a sale of liquor being made under the color of a delivery to one who had already purchased it, the State may forbid a transfer by the person to whom it is consigned of the right to receive it from the carrier" (Record, p. 30).

The principle and the logic are not new. In the C. O. D. cases, the argument was made that a statute prohibiting in effect such shipments should be sustained, in order to prevent the shipment C. O. D. without an order, and to prevent a sale under color of a C. O. D. shipment, or a delivery to one other than the purchaser. Because the statute prohibited all C. O. D. shipments, including cases of a *bona fide* transaction, as well as an illegal one, the state law was held void (*Adams Ex. Co.* v. *Ky.*, 206 U. S. 129).

Assuming that a statute would be valid, which prevented one who was not a *bona fide* purchaser by contract made in

another state, yet this statute cannot be sustained, because it disregards all question of the legality of the original contract, and all question of delivery to the original purchaser in good faith and makes the test of legality to be in the consignee as distinguished from purchaser. In other words, it is flatly held by the United States Supreme Court in the Rosenberger and Clark cases, *supra*, construing the Wilson Law and the Commerce Clause, and the police power of the State, that a state cannot pass a law aimed at the prevention of fraud or imposition, as to an interstate liquor shipment, if that law is also broad enough to include in its prohibitive terms a case of a *bona fide* interstate transaction. This is the case at bar. Everything in the instant case was done in good faith and the delivery was intended and ordered to be made to the *bona fide* purchaser. If the statute, designed to protect deliveries to those who were not *bona fide* purchasers, is construed by this court to cover such cases, then by the doctrine of the Rosenberger case, *supra*, the statute is invalid. The object might have been proper. Its failure, however, is certain, because it covers legitimate, as well as illegitimate, cases.

And a state law, preventing the storage of liquor at destination, beyond a certain length of time, would be void, if it prevented a *bona fide* shipment left on hand or stored in good faith a reasonable time, from being delivered (*Heyman* v. *So. Ry. Co.*, 203 U. S. 270). Yet the object of such a law would be to prevent the abuse, or misuse of the privilege, by rendering easy of execution the sale to another than the *bona fide* purchaser.

As to the cases cited in the opinion of the Kansas Supreme Court, we can only state that we deem the conclusions

of the Kansas Supreme Court from them unwarranted. They do not relate to liquor, and as the Supreme Court has squarely passed on the argument, as to liquor, it does not seem proper to attempt to apply the passing language used in decisions relating to butter and birds.

Cases of the class of *Plumley* v. *Mass.* (155 U. S. 473), cited, are readily distinguishable from this case. In the first place, only the sale, after arrival and delivery to the *bona fide* purchaser, was prevented. In the second place, the decision rests on the basis of the consumer of an article of food being prevented from a fraud directly on him. In the later case of *Schollenberger* v. *Penn.* (171 U. S. 1, l. c. 15), it was held that the fact that the article may lend itself to fraud is not enough. To justify state prohibition, it *must* be a fraud. Quoting:

> "A law which does thus prohibit the introduction of an article, like oleomargarine within the state is not a law, which regulates or restricts the sale of articles deemed injurious to the health of the community, but is one which prevents the introduction of a perfectly healthful commodity, merely for the purpose of in that way more easily preventing an adulterated or possibly injurious article from being introduced. We do not think this is a fair exercise of legislative discretion when applied to the article in question."

And so in the instant case, when applied to these facts and this *bona fide* sale and a delivery to be made to none other than the *bona fide* purchaser, this act designed to prevent, not such conduct, but a possible fraud on the law, is not a fair exercise of the police, or legislative power. In the Plumley opinion, the court differentiated the subject from the

principle of the liquor cases, and approved the case of *Leisy* v. *Hardin* (135 U. S. 100).

In *Silz* v. *Hesterberg*, 211 U. S. 31, cited by the court, the Plumley case is placed on the doctrine of being within the class relating to health, life and safety of the citizens. Here the liquor is to go to the man who bought it, before it was ever shipped. The real fraud would be, if anyone else, even the consignor, were permitted to get it.

In the Silz case, *supra*, this court bases its decision on the ground that it is within the police power of the State to protect and to preserve the game birds already in the state, as a valuable food supply, even if in so doing interstate commerce is indirectly affected. Here liquor in the state is not being protected, its very manufacture and sale being prohibited. And this instant Act is therefore aimed at and designed to act on interstate shipments alone and to directly prevent such of them as are within its terms. In the Silz case, *supra*, the court held that the state legislation considered in that case was sustainable even without the Federal Lacy Bird Act. The Lacy Bird Act is similar in terms, as to birds, to the Wilson Law as to liquor. If the Silz case can be correctly applied to interstate liquor shipments, then it would seem that, even the Wilson Law was unnecessary. We submit that the Kansas Supreme Court drew an unjustifiable conclusion from same, as shown by the Supreme Court's recent stand in the Rosenberger case.

As to the Delameter case, *supra*, cited, from the court's references to that case, it will be clearly seen that its force must be confined to the facts of that case. In *Heyman* v. *Hays* (236 U. S. 178), this court held that the interstate character

of the business prevents a state from imposing a privilege tax upon the business of soliciting by mail, orders for interstate shipments of intoxicating liquors, and the delivery for such shipment to a carrier within the state. This case is much more analagous to the Delameter case than the instant case. Yet this court held same was not an authority for any such legislation.

However, that the Kansas Supreme Court has drawn unjustifiable conclusions from the Delameter and other cases cited, and that this or any other law, which is passed by the State to prevent possible abuses "such as the ultimate delivery to a person who has not ordered same," or "the transfer to others by the ostensible person to whom the shipment was seemingly made," is void, if it covers all shipments made in the manner of the instant case, even where the delivery is to be made to the *bona fide* purchaser, and not to be sold to another "under color of such a delivery," is finally determined and set to rest by the following decision, later than any of the cited cases, distinguishing the Delameter case, and directly applicable to liquor, and to the very abuses discussed in the Kansas Supreme Court's opinion, is to be found in the case of *Rosenberger* v. *Pacific Express Co.*, 241 U. S., 48, l. c. 54-55:

> "And the contention just stated leads to a reference to suggestions, which we deem to be wholly irrelevant to the issue for decision made both in the opinion of the court below and in the argument at bar concerning possible abuses committed as the result of C. O. D. shipments of intoxicating liquors into states where the use of such liquor is prohibited, such as the unreasonable detention of such liquors before delivery, the ultimate delivery to a person who had not ordered the same, the

transfer to others by the ostensible person to whom the shipment was seemingly made, etc., etc. We say irrelevant suggestions, because we are considering here not whether a state statute enacting reasonable regulations under C. O. D. shipments would be a direct burden upon interstate commerce, but are only called upon to determine whether a statute is repugnant to the Commerce Clause, which expressly asserts the power of the State to forbid all C. O. D. interstate commerce shipments of intoxicating liquors without reference to abuse of any kind, or nature, in the manner in which said contracts are carried out."

We submit that the effect of Section 4399, Revised Statutes of Kansas, if properly construed, is that no shipment of liquor can possibly be made by the Shippers' Order method, however pure the intent, and regardless that the sole purpose of the method was to secure collection of the purchase price from, and delivery to, the *bona fide* purchaser. Such an effect, not being limited to prevention of abuses, renders the statute void as applied to interstate commerce, under the unmistakable ruling of the Rosenberger case, quoted *supra*.

IV.

Assuming, arguendo, that the Kansas Supreme Court's logic as to this case, and this statute, not being protected by the commerce clause, because of the Wilson law, is correct, yet, as Congress has already entered the field, such legislation is exclusive, and Section 4399, General Laws of Kansas, 1909, conflicting therewith, is invalid.

(a.)

If we assume that under the Wilson Law, Section 4399, R. S. Kansas, would have been valid, a concession which we

do not make, yet we find a later Federal law, the validity of which will not be disputed, providing that a consignee can give a written order to another to receive his shipment. Section 238 of the Penal Code of the United States is:

> "Any * * * common carrier, who shall knowingly deliver, or cause to be delivered to any person, other than the person to whom it has been consigned, UNLESS UPON THE WRITTEN ORDER IN EACH INSTANCE OF THE BONA FIDE CONSIGNEE * * * shall be fined," etc.

Now, can it be argued that by the Wilson Act, Congress intended to permit state legislation regulating the matter of deliveries to consignees, or upon their written orders, when Congress itself deemed Section 238 to be essential to be passed by itself on that subject? How can any state legislation prohibiting delivery on a written order be valid as to an interstate shipment, when Congress legislating on a subject it is granted control over by the Constitution, unmistakably, explicitly and plainly excepts a delivery "upon the written order in each instance of the *bona fide* consignee."

Using Section 238 as an indication of what Congress itself believed and intended the Wilson Law to effect on the matter, we find that Congress did not by the Wilson Law intend to permit an exercise of power over consignees or deliveries to them, or to their written order, until after a complete delivery by the carrier to some party, either the consignee or on his written order.

Considering Section 238 as an Act regulatory of the subject, we find that Congress previously silent on the proposition, has legislated in the field, as it undoubtedly has a right

to, as to interstate shipments, and has declared what shall be legal and what shall be illegal. Both the State and Congress cannot legislate on the matter. Either it is interstate commerce and in the domain of Congress, or it is not, and in the jurisdiction of the State.

But under the instant case, the State rests its authority in a prior Act of Congress—the Wilson Act. If the Wilson Act was passed by Congress, surely the interpretation placed on it by Congress that it did not give to the State the legislative field as to the consignees, should be of great weight.

But if the Wilson Act did grant the State such right, then Congress by this later Act, Section 238, has superseded that portion and power of the Wilson Law.

Or, if authority is found in the silence of Congress on the subject, such authority was removed by Congress having spoken. The matter is so well stated by the Supreme Court of Tennessee in a decision rendered in 1914, that we quote at length:

> "In what has been said, we have treated the question from the standpoint which we believe to be the true one, that the regulations in question invade that field which is in the exclusive power of Congress, interstate commerce in its fundamental aspect; but, if we err in this, the same result follows from viewing them as falling within the concurrent field, since Congress has already entered this field with sundry regulations, and has thus occupied the field, excluding any conflicting State regulations. First, is the Interstate Commerce Act. Its provisions apply to all corporations engaged in the transportation of persons and property and declares that the term 'transportation' shall include 'cars * * * facilities of shipment or carriage, * * * all services in connection with the receipt, delivery * * * and hand-

ling of property transported.' Congress has regulated interstate commerce in intoxicating liquors as follows: The 'Wilson Act,' subjecting such liquors to the state laws upon arrival, that is, immediately upon delivery (3 Fed. Stat. Ann. 853), by a provision making it unlawful for a carrier to deliver to any person, except the consignee, or his written order (Crim. Code, U. S. Sec. 238), also making it unlawful to deliver to a fictitious person (*id.*); also a provision making it unlawful for any person to ship any package of intoxicating liquors not so labeled on the outside as to show the name of the consignee, the nature of the contents, and the quantity; and finally the Webb-Kenyon Act, to which we will presently refer with more particularity. As complainant's brief soundly insists, interstate transportation 'is regulated by the Interstate Commerce Act—that is to say, all the services in connection with the receipt, delivery and handling of the property transported. Necessarily, that excludes all state action. But, specifically, Congress has regulated the labeling; HAS PROVIDED THAT IT MAY BE DELIVERED ON THE ORDER OF THE CONSIGNEE; that the liquor shall be subject to state laws on 'arrival,' which the courts have construed to mean delivery, and thereby necessarily declaring that the state laws shall not attach prior to delivery. Congress has provided against C. O. D. shipments; against shipments with intent to violate state laws by sale or use. It has placed no limit on quantity, and, instead of requiring a statement from the consignee, has provided what shall be marked on the outside of the package itself."

"That part of Section 5, which forbids the delivery of intoxicating liquors 'to any person other than the consignee,' is void so far as it applies to interstate shipments, because in conflict with the Federal Statute on the same subject."

Palmer v. *Southern Ex. Co.*, 165 S. W. 236, l. c. 243.

In Oklahoma there is a statute, Section 4197, Comp. Laws of Okla., reading without any material difference like Section 4399. Of that statute the Supreme Court of Oklahoma has said:

> "And in the recent case of *State of Iowa* v. *Wignall*, 150 Ia. 650, the Supreme Court of Iowa has upheld a statute prohibiting a consignee from employing a third person to transport intoxicating liquor from the depot to his residence. Although the correctness of this decision is subject to doubt in view of Section 238 of the Penal Laws, previously quoted, as well as the decisions of this court and of the Criminal Court of Appeals of this state, which have previously been cited. Comp. Laws 1909, Section 4197."
>
> *Blunk* v. *Waugh* (32 Okla. l. c. 625).

In *McCord* v. *State* (2 Okla. Cr. Rep. 214), this statute was considered. It was held to have no effect as to an interstate shipment, as the residence of the consignee, except in cases of abuse.

Conclusion.

Interstate commerce of liquor is a shipment from one state to another on a *bona fide* order. The police power of the State does not apply to such shipments, until after the carrier has made a delivery in execution of its original contract and the contract of the parties, valid where made. The case of *Rosenberger* v. *Pacific Express Company*, 241 U. S. 48, meets every argument and proposition advanced in the opinion of the Supreme Court of Kansas. It approves our contention as to Shippers' Order shipments being within the

protection of the Commerce Clause of the Federal Constitution.

The Supreme Court of Kansas made a palpably erroneous construction of Section 239, United States Penal Code, which of its own initiative it considered and construed. The error ought to be corrected. And upon like initiative and in all fairness, we feel that Section 238, United States Penal Code should be construed.

The court should bear in mind that the Webb-Kenyon Law, of later date, has no effect on this case. The opinion of the Kansas Supreme Court is repugnant to the Commerce Clause of the Federal Constitution, laws of the United States and the decisions of this court.

Plaintiffs in error earnestly pray that the judgment and decision of the Supreme Court of Kansas be reversed, and this cause be remanded for further proceedings, in conformity with the correction of the errors assigned.

Respectfully submitted,

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